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LEGISLATIVE AND JUDICIAL ENCROACHMENTS ON CONSTITUTIONAL PROVISIONS.

There seems to be a tendency on the part of some of our courts to encroach upon provisions of the state constitutions through judicial determinations relative to legislative enactments and by the most strained constructions try to show that in some way, by some implication, the enactments come within the meaning of the constitution. This tendency is dangerous in the extreme, and should be checked, or some of the most substantial rights of the people, guaranteed by the constitution will be legislated away by the legislature and the courts, in a strained effort to support legislative enactments. Once a decision goes into the reports it is a case for the case lawyer and the case judge; it is a precedent, and soon another precedent is added to the original because of the original, and so the wrong accumulates.

In the recent decision by the Iowa Supreme Court, in the case of Brady v. District Court, 102 N. W. Rep. 115, where the Supreme Court of Iowa construes a constitutional provision with reference to purely jurisdictional matters, as intending to give the legislature the right to control the inherent powers of a court to regulate its own affairs. It is certain that no such implication even may be drawn from the constitution of the state of Iowa to warrant such construction, and even if it could be done by implication it certainly would be very bad policy to judicially legislate important constitutional provisions into being through mere implications. It ought to be laid down as an inflexible rule, that courts will not construe statutes to be sanctioned by the constitution, unless the language of the constitution clearly and definitely points out the right of the legislature to pass such statutes, or, that it is plain that such statutes do not impinge the boundaries of the constitutional limitations. As inherent powers of court do not depend upon constitutional grant, nor in any sense upon legislative will, it ought to have been clear to the Iowa court that in the exercise of the inherent powers of courts, they could not go beyond the lines marked out by the constitution. While the legislature might enact certain lines of procedure, neither the legislature nor the courts in the exercise of inherent powers could pass over express constitutional grants and leave in the court the right to proceed in any manner contrary to those grants. It was pointed out in the well considered case of Wyatt v. People, 17 Colo. 261, 28 Pac. Rep. 964, that it was "worthy of observation that in only the states of Georgia and Louisiana is power given by the constitution of the state to the legislature to limit the power of the court to punish for contempt. In all other states the better opinion is, that where the court is a creature of the constitution the inherent power to punish for contempt cannot be shorn, abridged, limited or regulated. This is the only logical view to take, because by Constitution, art. 3, the powers of government are distributed between the legislative, executive and judicial departments, and it is further expressly provided that no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted. And nowhere in the constitution is the legislature given any power to meddle with the inherent powers of the courts." In cases where the evidence lies outside the knowledge of the courts, unless confessed the question becomes a fact to be investigated, and upon denial by the contemnor under oath, precludes the court from further investigation, because the constitution provides that a person has a right to trial by jury where life and liberty is concerned. But why a legislature might not provide for a trial by jury to aid a court in contempt proceedings, in cases where the contemnor denies under oath the things charged, is a matter which seems to have escaped consideration. Further, why, in the inherent powers of a court to regulate its own affairs, it may not also possess the power to call in a jury, when necessary, does not seem anything more than just and reasonable. It would seem the only practical as well as logical way out of the proposition, when the contemnor denies the charges under oath,

which may require evidence, not in the knowledge of the court to prove. If the court chose to exercise the right to call in a jury in the course of regulating its affairs by virtue of its inherent powers, why is there any practical reason that the court may not do this through the regular channels? It is conceded in Wyatt v. People, *supra*, that "though the legislature cannot take away from the courts created by the constitution the power to punish contempt, reasonable regulations by that body touching the exercise of this power will be regarded as binding." But the court says, however, it is a contradiction of terms to say the power to punish is inherent, but that the legislature may regulate the exercise.

NOTES OF IMPORTANT DECISIONS.

RESCISSION—RESTORATION OF THE STATUS QUO.—The following interesting opinion was rendered in the Court of Common Pleas, Allegheny Co., Pennsylvania. It may be found in the *Pittsburg Legal Journal* of August 23d, 1905. Ward v. Anderson. A bill in equity to cancel an agreement for the purchase of real estate and of a note given in part payment therefor and the redelivery of security given as collateral security for the note, will be decreed where it appears that the agreement of sale provided for a general warranty deed and the land to be free of incumbrance, but the plaintiff (the purchaser) discovered before the delivery of the deed that the lessee had the right to remove one of the buildings which was of material value at the termination of his lease. The plaintiff's right to a decree in this case was strengthened because there was nothing in the agreement relating to the tenant's right to removal of the building and the defendant's parol evidence tending to establish plaintiff's knowledge of this fact was not established by evidence which was clear, precise and indutiable. Among other things the court said:

"If Ward has the right to recover, why not the right to rescind this contract before final execution? Why should this court, exercising equitable powers, compel payment for lands, even with general warranty, when Ward does not obtain a good right to all that he purchased? If enforced payment could not be retained, why make sincerity of action a necessity? Stoddart v. Smith, 5 Binn. 355. This is not the case of a suit upon a note or bond, given for purchase of money after delivery and acceptance of a deed on the ground of a defect in title, of which defendant had notice at the time of purchase; nor of a purchaser taking property with a known defect and taking the covenant as a protection against the defect, but it is a case where the purchaser agreed to take all of a certain piece of property without incumbrances, and with covenants of general warranty. Even if he knew there were defects in the title, it does not follow that he agreed to so accept it. If such was the intention, it should have been put in the contract. The contention that the first contract expired and that this transaction depends upon the second contract alone, cannot be sustained. The two contracts must be taken together, as the second distinctly refers to the first and recites that it, the first contract, is arranged on a new basis. One of these new stipulations is that Anderson may sell the property to someone else. The tender of deed to Ward on November 3d and his statement that he would accept the property when the money was raised, did not execute the two contracts and bind him to final acceptance, if before that time he ascertained that the tendered deed did not convey all that was contracted for. Let a decree be prepared continuing the injunction; cancelling the agreement of purchase and sale and the note in defendant's possession; directing the redelivery of the collateral security now held by him, as well as the repayment of the purchase money advanced."

This case shows the scope of equitable powers. It is a proceeding for a rescission. There is a marked difference between a proceeding in equity for a rescission and a proceeding at common law, upon a rescission. See CENTRAL LAW JOURNAL, May 19, 1905, leading article entitled, the "Difference Between a Proceeding for a Rescission and One Upon a Rescission." In the above case the court must have proceeded upon the theory that there had been a total failure of contract. It is not necessary that every stipulation in a contract be broken in order to constitute a total failure. If a stipulation, which might be regarded as one of the elements, without which it is reasonable to conclude the contract might not have been made, is abandoned or there has been a refusal to perform it, or the party upon whom performance devolves put it out of his power to execute, then there is a total failure, an abandonment of the contract, or a rescission of it, and the injured party may so regard it. Lake Shore & Mich. So. Ry. Co. v. Richards, 30 L. R. A. 30 and notes thereunder; Lincoln Trust Co. v. Nathan, 175 Mo. 175.

NEGLIGENCE—RIGHT OF WORKMAN PUTTING HIMSELF IN A PLACE OF DANGER TO EXPECT A CUSTOMARY WARNING.—In the case of D'Agastino v. Pennsylvania R. Co., 60 Atl. Rep. 1113, the plaintiff's intestate was employed by the defendant as a track laborer. On March 18, 1902, he was working on the tracks of the company at Waverly. There are several parallel tracks at this point. At the time he was killed the deceased was working upon track No. 5. The gang of which the deceased was a member was working on tracks Nos. 3, 4 and 5. Deceased was

engaged in sorting loose stones from the earth on track No. 5, which was the drill track, and throwing the stones, when sorted, on track No. 4, which is the westbound passenger track. While at work the deceased was necessarily bent over. He could not, of course, devote his attention to his work and the approaching trains at the same time. The proof in the cause shows that there was a foreman and an assistant foreman present, who did not actually engage in the work, but only acted as superintendents. The proof was that the foreman of gangs of men at work as the deceased and his fellow laborers were at the time he was killed were accustomed, upon the approach of a train, to call out to the men, "Look out on track No. 3!" "Look out on track No. 4!" or whatever track it happened to be upon which the train was approaching. It is clear that the men relied upon this warning, and it is equally clear that it was the custom of the company to give it. It is conceded that when the deceased was killed by the backing upon him of a freight engine on track No. 5 no such warning was given. Both the foreman and his assistant were absent at the time. They were at the "shanty" some distance away. It was testified by the foreman that it was the custom, when he left the men unprotected, owing to his going on some temporary duty, for him to warn them of his leaving, and to caution them to look out for themselves; to call out to them, "Now boys look out!" He says he did this on this day, but it appears by the proof that, if he called at all, he did not call so that all heard, and that the deceased was too far away to hear if he did so call.

On this state of facts the court said: "We think that the deceased had a right to rely upon the fact that, if there was any danger from an approaching train, the customary warning would be given. There was no error in the refusal to nonsuit or to direct a verdict for the defendants. Where a workman, in the discharge of his duty, has placed himself in a position of probable danger, and where he has a right to expect a warning before the danger becomes actual, and he is injured because no warning was given, the question whether he assumed the risk or was guilty of contributory negligence cannot be decided by the court. Albanese, Adm'r, v. Central R. Co., 70 N. J. Law, 241, 57 Atl. Rep. 447; Harmer v. Reed Apartment Co., 68 N. J. Law, 332, 52 Atl. Rep. 402. Under the proof this case cannot be distinguished on principle from that of the Belleville Stone Co. v. Mooney, 61 N. J. Law, 253, 39 Atl. Rep. 764, 39 L. R. A. 834. In that case it was held, where the giving of a warning was embraced in the duty owed by the employer to the employee in order that the place where the employer sets the employee to work may be kept safe, that the failure of the foreman to discharge this duty carefully was imputable to the employer, and that such failure was not one of the obvious dangers of which the employee assumed the risk. It was strongly contended in this case that he danger to the deceased of being run over was clarly an obvious one. On this point, in Belleville Stone Co. v. Mooney, Mr. Justice Dixon says: 'Nor will the doctrine that servants assume the obvious risks of their employment save the defendant in this case, for that doctrine is not applicable to the risks arising from negligence in the discharge of the master's duty to his servant. No doubt the plaintiff took the risks of the system under which he knew the quarry was worked. He could not be heard to complain that places of refuge close at hand were not provided, or that other possible precautions, which he saw were not in use, were omitted. But he had a right to expect that the precautions which the defendant had provided for the security of the quarrymen should be carefully observed, and he did not assume the risk of a negligent observance.'"

A foreman who directs a workman to engage in work which turns out to have been dangerous, the workman having relied on the foreman to notify him of the danger, is not guilty of contributory negligence. Hass v. Balch, 26 Fed. Rep. 984, 6 C. C. A. 201, 12 U. S. App. 534.

Where there was doubt as to the boss having given warning of dangers of which it was his duty to warn men under his charge, the question is one for the jury. Alaska Treadwell Gold Min. Co. v. Whelan, 64 Fed. Rep. 462, 29 U. S. App. 1; Mills v. East Tenn., V. & G. Ry. Co., 87 Ga. 102, 13 S. E. Rep. 205; Morebach v. Home Min. Co., 53 Kan. 731, 37 Pac. Rep. 122; Cox v. Senite Granite Co., 39 Mo. App. 439; Warner v. C., R. I. & P. Ry. Co., 62 Mo. App. 184; Fort v. Whipple, 11 Hun, 586; Benzing v. Steinway, 101 N. Y. 547, 5 N. E. Rep. 449; Kooswrowska v. Glasser, 8 N. Y. Supp. 197.

WHEN IS NOTICE TO AN AGENT NOTICE TO HIS PRINCIPAL?

The general rule is that notice to an agent is notice to his principal; but, like most general rules, it has its qualifications.

A brief inquiry into the foundation of this doctrine will aid in determining when it is applicable and what are its limitations.

Some of the authorities base the rule upon the theory of the legal identity of the principal and his agent—upon the view that the agent while acting as such is the *alter ego* of the principal. But the majority of the cases place the doctrine on the ground of the agent's duty to disclose to his principal all knowledge he may possess that is important for the guidance of the principal in the transaction of his business, the discharge of his duties, or the

protection of his interests, and on the presumption that the agent will perform this duty. The courts adopting this theory conclusively presume the duty to have been performed by the agent, and charge the principal with the knowledge as a matter of law, unless the facts bring the case within one of the exceptions hereinafter noticed. In other words, according to this view, the policy of the law will not allow the principal, after having the benefit of the agent's services and acts, to plead ignorance of facts material to the subject-matter of the agency that were known to the agent and present to his mind at the time of the transaction in question. Such courts consider that, if the agent has not performed his duty by disclosing his knowledge to his principal, the principal who trusted him should suffer rather than an innocent third party. Most courts holding the theory first mentioned refuse to bind the principal by any knowledge of the agent not obtained while transacting the business of the principal. On the other hand, most of the courts adopting the other theory hold that it is immaterial when or how the knowledge came to the agent, provided it reasonably appears that he actually possessed it at the time of the transaction which is the subject of the suit.

The rule is sometimes stated in broad terms that notice to an agent is notice to his principal; but the doctrine, as thus stated, is, as already suggested, subject to several limitations, which will be herein briefly discussed.

It may be well to explain that cases where the agent actually has communicated the knowledge to his principal fall outside the limits of this discussion, for in such cases the knowledge has become the knowledge of the principal himself and no question of imputed notice arises.

Also it may be further premised that, when the doctrine of imputed notice has any application, it applies equally to cases where the agent has full knowledge of the main fact the principal is sought to be charged with notice of and to cases where the agent receives notice of facts or circumstances putting him on inquiry as to the main fact. In either case the principal is affected with notice.[1]

One of the limitations upon the general rule above stated is that notice received or knowledge possessed by the agent relative to some matter outside the scope of the agent's employment will not be imputed to the principal. If the information does not affect the principal's interests except in some department of his business with which the agent has no connection, and if the agent has nothing to do with consummating the transaction in which such information becomes material, then the notice received by the agent is not binding upon the principal.[2] It has also been held that, if an agent, acting within the scope of his employment, is negotiating a transaction for his principal and while so doing receives notice of a fact material to the transaction in question, but does not impart the information to the principal, who, in ignorance thereof, takes up the negotiations after they have been broken off by the agent and after the agency has ceased and consummates the transaction in person or by means of a different agent, in such case the knowledge of the agent will not be binding upon the principal.[3] But this decision appears to be in conflict with the English case of Blackburn v. Vigors,[4] in which a broker, employed to obtain insurance upon a ship, received notice of a fact tending to show that the ship was lost, but failed to obtain the insurance, after which another broker was employed who obtained a policy on the ship, lost or not lost, and it subsequently transpired that the ship had been lost before the first efforts were made to effect the insurance. Notice of the fact that the ship had been lost was imputed to the plaintiff, though the first agent did not disclose his knowledge and the second one had none. If the knowledge has came to the agent as a confidential and privileged communication, so that it would be a breach of professional confidence for him to disclose it to his principal, then the law raises no presumption that he has done so and does not impute such knowledge to his principal.[5] If, in the transaction in which

[1] Wiley, Banks & Co. v. Knight, 27 Ala. 336; Babbitt v. Kelly (Mo. App.), 70 S. W. Rep. 384; Wade on Notice, Sec. 672.

[2] Walker v. Hannibal & St. J. R. Co., 121 Mo. 575, 26 S. W. Rep. 360, 42 Am. St. Rep. 547, 24 L. R. A. 363; Missouri, K. & T. Ry. Co. v. Belcher, 88 Tex. 549, 32 S. W. Rep. 518; *Id.*, 89 Tex. 428, 35 S. W. Rep. 6; Roach v. Karr, 18 Kan. 529, 26 Am. Rep. 778; Topliff v. Shadwell (Kan.), 74 Pac. Rep. 1120.

[3] Irvine v. Grady, 85 Tex. 124, 19 S. W. Rep. 1028.

[4] 17 Q. B. Div. 553.

[5] Akers v. Rowan, 33 S. Car. 451, 12 S. E. Rep. 165, 10 L. R. A. 705; The Distilled Spirits, 78 U. S. 356, 20 L. Ed. 167; Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319.

the principal is sought to be bound by the knowledge of the agent the latter has an interest of his own, which he is pursuing and which in any way conflicts with the interests of his principal, or if he represents any interests of others adverse to those of his principal, the principal will not be bound by the agent's knowledge.[6] The presumption is that the agent will not disclose that which will likely injure his own interests or defeat his plans. But the foregoing proposition is, by some authorities at least, modified to this extent, that the agent's representation of the other party will not prevent his knowledge from being imputed to his principal, if the principal knows of and consents to the dual agency.[7] Also where the agent and the party seeking to bind the principal by the agent's knowledge have colluded together to defraud the principal, the law does not affect the latter with the notice the agent has received.[8] This principle finds frequent illustration in cases where a loan agent and the borrower collude together to defraud the loan company by inducing it to make a loan upon the homestead of the borrower.

Thus far we have met with no very material difference of opinion among the authorities, except as to the true theory upon which the doctrine should be based; but when we undertake to determine at what time and under what circumstances the agent must receive the notice in order that it may be binding on the principal, we are confronted with an irreconcilable conflict in the decisions. The great weight of authority, both in the United States and in England, supports the proposition as expressed by Mechem[9] that, "The law imputes to the principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority, or which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it; provided, however, that such notice or knowledge will not be imputed; 1. Where it is such as it is the agent's duty not to disclose, and, 2. Where the agent's relations to the subject-matter, or his previous conduct, render it certain that he will not disclose it, and, 3. Where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal."[10] However, there are many *dicta* in the reports, and several actual decisions, to the effect that the principal will not be bound

[6] Frenkel v. Hudson, 82 Ala. 158, 2 So. Rep. 758, 60 Am. Rep. 736; Dillaway v. Butler, 135 Mass. 479; Kaufman v. Robey, 60 Tex. 308; Booker v. Booker, 208 Ill. 529, 70 N. E. Rep. 709; Davis v. Boone County Deposit Bank (Ky.), 80 S. W. Rep. 161; Ætna Indemnity Co. v. Schroeder (N. Dak.), 95 N. W. Rep. 436; Bank of Overton v. Thompson, 118 Fed. Rep. 798; Scotch Lumber Co. v. Sage (Ala.), 32 So. Rep. 607; Smith v. Boyd, 162 Mo. 146, 62 S. W. Rep. 439.

[7] Pine Mountain Iron & Coal Co. v. Bailey, 94 Fed. Rep. 258; Smith v. Farrell, 66 Mo. App. 8.

[8] Western Mortg. & Inv. Co. v. Ganzer, 63 Fed. Rep. 647; Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. Rep. 282, 52 Am. Rep. 710; City of New York v. Tenth Nat. Bank, 111 N. Y. 446, 18 N. E. Rep. 618; Centennial Life Assn. v. Parham, 80 Tex. 526, 16 S. W. Rep. 316; Campbell v. Crowley (Tex.), 56 S. W. Rep. 373; Hadden v. Dooley, 92 Fed. Rep. 274; Lamson v. Beard, 94 Fed. Rep. 30.

[9] Mechem on Agency, Sec. 721.

[10] The Distilled Spirits, 78 U. S. 356, 20 L. Ed. 167; Shafer v. Phœnix Ins. Co., 53 Wis. 361, 10 N. W. Rep. 381; Chouteau v. Allen, 70 Mo. 290; Hart v. Farmers' & Mechanics' Bank, 33 Vt. 252; Wilson v. Minn. Farmers' Mut. Fire Assn., 36 Minn. 112, 30 N. W. Rep. 401, 1 Am. St. Rep. 659; Bank v. Hollenbeck (Minn.), 13 N. W. Rep. 145; Trentor v. Pothen (Minn.), 49 N. W. Rep. 129; Westerman v. Evans, 1 Kan. App. 1, 41 Pac. Rep. 675; Wittenbrock v. Parker (Cal.), 36 Pac. Rep. 374, 24 L. R. A. 197; Bierce v. Red Bluff Hotel, 31 Cal. 160; Whitten v. Jenkins, 34 Ga. 305; Day v. Wamsley, 33 Ind. 147; Cummings v. Harsabrauch, 14 La. Ann. 722; Hovey v. Blanchard, 13 N. H. 145; Bank v. Campbell, 4 Hump. (Tenn.) 394; Campau v. Konan, 39 Mich. 362; Yerger v. Barz, 56 Iowa, 77; Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319; Suit v. Woodhall, 113 Mass. 391; Dresser v. Norwood (England), 17 Com. Bench (N. S.) 466; Mountford v. Scott (Eng.), 1 Turn. & Russ. 274; Constant v. University of Rochester, 111 N. Y. 604, 2 L. R. A. 734; Schwind v. Boyce (Md.), 51 Atl. Rep. 45; Manson v. Simplot (Iowa), 93 N. W. Rep. 75; Babbitt v. Kelly (Mo. App.), 70 S. W. Rep. 384; Deering v. Holcomb, 26 Wash. 588, 67 Pac. Rep. 240; Major v. Stone's River Nat. Bank (Tenn. Ch. App.), 64 S. W. Rep. 352; Gregg v. Baldwin, 9 N. Dak. 515, 84 N. W. Rep. 373; Red River Valley Land & Inv. Co. v. Smith (N. Dak.), 74 N. W. Rep. 194; Brown v. Cranberry Iron & Coal Co., 72 Fed. Rep. 96; Hartford Fire Ins. Co. v. Haas (Ky.), 2 L. R. A. 64; Snyder v. Partridge, 138 Ill. 173, 29 N. E. Rep. 851; Roderick v. McMeekin, 204 Ill. 625, 68 N. E. Rep. 473; Equitable Sureties Co. v. Sheppard, 78 Miss. 217, 28 So. Rep. 842; West v. Norwich Union Fire Ins. Soc., 10 Utah, 442, 37 Pac. Rep. 685; Pomeroy v. Rocky Mountain Ins. & Sav. Inst., 9 Colo. 295, 12 Pac. Rep. 153; Manhattan Fire Ins. Co. v. Weill (Va.), 28 Grat. 389, 26 Am. Rep. 364; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. Rep. 1059; 2 Kent's Com. (12th Ed.), 630, note 1; Story on Eq. Jurisp. (10th Ed.), Sec. 408, note 2; 2 Pomeroy on Eq. Jurisp. (2nd. Ed.), Sec. 672; Wade on Notice, Secs. 687-8.

by knowledge of, or notice to, his agent unless it was received by the agent while actually engaged in transacting the principal's business in the line of the agent's duty.[11]

Some courts have even gone so far as to hold that the notice, in order to be binding upon the principal, must not only come to the agent while he is acting as such, but must reach him while he is engaged in the very transaction which is the subject-matter of the litigation and in which the principal is sought to be bound by the agent's knowledge; and that it is not enough that the agent acquired the information in a similar transaction for his principal immediately preceding the one in controversy.[12] But some other courts, though adhering to the doctrine that the principal will not be affected with any knowledge of the agent that did not come to him while engaged in the principal's business, hold that the rule is satisfied and the principal bound if the knowledge or notice was received by the agent while engaged in a transaction for his principal which preceded, and was independent of, the particular transaction in litigation, provided the same agent who received the notice is the one who consummates the transaction in suit. It was so held in Illinois[13] and Texas,[14] in cases where the telegraph operator sending the message in suit had, at the time of receiving the message, knowledge of facts sufficient to put him on notice as to its nature and importance by reason of the fact that he had handled previous telegrams between the same parties.

It will be seen from a reading of the cases cited in notes 10 and 11, *supra*, that the doctrine imputing to the principal all knowledge that was present to the agent's mind at the time of the transaction in controversy, no matter when or how such knowledge was acquired, now prevails in England, in the United States courts, and in California, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New York, North Dakota, Tennessee, Vermont, Washington and Wisconsin, and apparently in Colorado, Mississippi, Utah and Wyoming; while the contrary rule prevails in Alabama, Connecticut, Pennsylvania, South Carolina and Texas. The decisions in Kentucky, as represented by Willis v. Vallette and Hartford Fire Ins. Co. v. Haas, cited *supra*, are inconsistent and do not seem to have definitely settled the doctrine either way. The other states of the Union do not appear to have passed on the question. In England, Illinois and New York the rule formerly was that the agent's knowledge would not affect the principal unless acquired in the exercise of the agency;[15] but those jurisdictions have changed front and now stand with the majority on the other side of the question.[16] Perhaps the same remark is applicable to some of the other jurisdictions above mentioned.

The decisions and *dicta* in the state of Texas on this subject appear to be in considerable confusion. In Kaufman v. Robey,[17] it is said by Willie, C. J., that the principal is not chargeable with notice of facts "if they

[11] Kaufman v. Robey, 60 Tex. 308; Loan Agency v. Taylor, 88 Tex. 49, 29 S. W. Rep. 1057; Merrill v. Southwestern Teleg. & Teleph. Co. (Tex. Civ. App.), 73 S. W. Rep. 422; Allen v. Garrison, 92 Tex. 548, 50 S. W. Rep. 335; Cooper v. Ford (Tex. Civ. App.), 69 S.W. Rep. 487; Houseman v. Girard, etc., Assn., 81 Pa. St. 256; Willis v. Vallette, 4 Metcalfe (Ky.), 186; Howard Ins. Co. v. Halsey, 8 N. Y. Ct. of App. 271; McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Mundine v. Pitts, 14 Ala. 84; Congar v. Ry. Co., 24 Wis. 157; Pritchett v. Sessions, 10 Rich. (S. Car. Law) 293; Weisser v. Denison, 10 N. Y. Ct. of App. 68, 61 Am. Dec. 731; Bank of U. S. v. Davis, 2 Hill (N. Y.), 451; North River Bank v. Aymar, 3 Hill (N. Y.), 262; Farmers', etc., Bank v. Payne, 25 Conn. 444, 68 Am. Dec. 362; Kyle v. Goff (Mo. App.), 78 S. W. Rep. 1047; Mencke v. Rosenberg, 202 Pa. St. 131, 51 Atl. Rep. 767; Lane v. DeBode (Tex. Civ. App.), 69 S. W. Rep. 437; Scotch Lumber Co. v. Sage (Ala.), 32 So. Rep. 607; Central of Georgia Ry. Co. v. Joseph (Ala.), 28 So. Rep. 35; St. Paul F. & M. Ins. Co. v. Parsons, 47 Minn. 352, 50 N. W. Rep. 240; Queen Ins. Co. v. May (Tex. Civ. App.), 35 S. W. Rep. 829; Western Assur. Co. v. Stoddard, 88 Ala. 606, 7 So. Rep. 379.

[12] New York Cent. Ins. Co. v. Natl. Protective Ins. Co., 20 Barbour (N. Y.), 468; Bracken v. Miller, 4 Watts & S. (Pa.) 102; Warrick v. Warrick, 3 Atk. 291.

[13] Postal Tel. Cable Co. v. Lathrop, 131 Ill. 575, 7 L. R. A. 474. This case appears to have been decided before Illinois abandoned the doctrine that the notice must come to the agent while acting as such. See Snyder v. Partridge, 138 Ill. 173, 29 N. E. Rep. 851; Roderick v. McMeekin, 204 Ill. 625, 68 N. E. Rep. 473.

[14] Erie Teleg. & Teleph. Co. v. Grimes, 82 Tex. 89, 17 S. W. Rep. 831.

[15] Warrick v. Warrick (England), 3 Atk. 291-4; Bank of U. S. v. Davis, 2 Hill (N. Y.), 451; Howard Ins. Co. v. Halsey, 8 N. Y. Ct. of App. 271; Weisser v. Denison, 10 N. Y. Ct. of App. 68, 61 Am. Dec. 731; North River Bank v. Aymar, 3 Hill (N. Y.), 262; McCormick v. Wheeler, 36 Ill. 114.

[16] Dresser v. Norwood (England), 17 Com. Bench (N. S.) 466; Constant v. University of Rochester (N. Y.), 2 L. R. A. 734; Snyder v. Patridge, 138 Ill. 173, 29 N. E. Rep. 851.

[17] 60 Tex. 308.

come to the knowledge of his agent whilst engaged in a transaction with which the principal has no concern;" but the remark was not necessary to the decision, as will clearly appear from the following extract from the opinion, viz: "Applying these principles to the present case, we find that, although Wallace was agent of Kaufman & Runge when the $1,500 note was placed with him, yet he obtained that note whilst acting for himself and partner, and not in any matter in which he was acting for the plaintiffs. Moreover, it was in antagonism to the interest of his principals that he should obtain so large a collateral to secure his small debt, and thus withdraw a great amount of the individual property of one member of the failing partnership and place it where it was beyond the reach of his principals and the other creditors of the firm for his own benefit." The facts of the case further show that the acquisition of the knowledge by the agent and the transaction in which the principals were sought to be bound by such knowledge were separated by a long period of time, during which period the agency was terminated. There existed in this case two distinct facts, either one of which would, according to all the authorities, have defeated the attempt to bind the principals by the agent's knowledge, viz: first, the fact that it was in no way shown that the agent receiving the information still retained it at the time of the transaction in which the principals were interested and would probably have actually had the knowledge present to his mind at the time of the latter transaction had the agency continued to that time and the matter been consummated through this agent; and, second, the fact that the agent received the notice while acting for himself and in antagonism to the interests of his principals, and was, therefore, supplied with a motive to conceal, rather than communicate, his information.[18] Hence it is clear that the facts of this Kaufman case did not call for an announcement of the broad doctrine that a principal could never, under any circumstances, be bound by the knowledge of his agent acquired otherwise than in the exercise of his agency; and yet that is the very doctrine that has been derived by the courts of Texas from the Kaufman case. The *dictum* of Judge Willie in said Kaufman case was followed by a *dictum* of Judge Gaines to the same effect in Loan Agency v. Taylor,[19] being a case in which it was sought to bind a loan company with notice which it was claimed its agent had received years before concerning a trust in lands. The report of the case clearly shows that if Taylor had received any notice of a trust prior to the making of the loan in which he represented the loan company, such knowledge had, in all probability, owing to the long lapse of time, faded effectually from his memory. The facts before the court did not call for any decision as to what the legal result would have been if the information concerning the trust had come to the agent just prior to the making of the loan, but at a time when he was not engaged in the exercise of his agency; nor did they call for a decision as to what the legal result would have been if the evidence had shown that, notwithstanding the fact that the information was received years before, it was still retained and was present to the agent's mind at the time of the transaction in suit. As usually happens, these *dicta* afterwards bore fruit in actual decision. The Court of Civil Appeals of Texas, in the case of Merrill v. Southwestern Teleg. & Teleph. Co.,[20] held that knowledge of a woman's death, accidentally obtained by a telephone operator on the street just a moment before ascending the stairway to the company's office to engage in the discharge of his duties as operator, will not be imputed to the company in a suit arising over a telephone call put in simultaneously with the arrival of said operator at the office, which said call was put in for the purpose of obtaining communication with a son of the deceased in a distant town and was handled and attempted to be transmitted by this same operator. The decision is tantamount to a plain and unequivocal holding that a principal can never, under any circumstances, be chargeable with notice of a fact known to his agent and vividly present to the agent's mind, unless he came into possession of the knowledge while actually doing the work of his principal. The supreme court of the state placed the stamp of its approval upon the decision by denying a writ of error, which action appears to have settled the question so far as Texas is concerned. However, a

[18] See authorities cited in notes 6, 9 and 10, *supra*.

[19] 88 Tex. 49, 29 S. W. Rep. 1057.

[20] 73 S. W. Rep. 422.

search among the reports of that state will discover decisions which, though not expressly overruled or even adverted to by the court in the Merrill case, seem to be in irreconcilable conflict therewith. In the case of Liverpool & London & Globe Ins. Co. v. Ende,[21] a party who had made an assignment for the benefit of creditors afterwards took out insurance on a business building he had occupied; and the building burned. The company denied liability on the ground that the title to the building had passed to the assignee by the assignment for creditors, and that, consequently, the assured was not sole and unconditional owner of the building when the policy was issued. The supreme court expressed the opinion that the property was a business homestead and did not pass by the assignment, but planted its decision against the insurance company principally on the ground that the insurance agents who wrote and delivered the policy knew all the facts, that their knowledge was in law the company's knowledge, and that the company by taking the premium and delivering the policy with such imputed knowledge of the facts had estopped itself from denying liability. In this case the agents obtained the information that was imputed by the court to their principal at least eight months before the issuance of the policy. They did not obtain the information while acting for their principal, but obtained it by general observation as residents of the same town with the assured and by reason of one of them being a newspaper proprietor and publishing in his paper, at the instance of the assignee, the legal notice required by law to be given of the assignment for creditors. In Western U. Tel. Co. v. Jobe,[22] one of the Texas courts of civil appeals, in support of its finding that the company had notice of the relationship of the parties, says: "J. E. Lampkin, a son of the deceased, testified, 'I know (and then knew, referring to date of message), the manager of defendant's office at Harwood. It was Miss Dean Richardson. She knew our family, and knew the condition of my father. She knew the relations existing between John Lampkin (his father) and Mrs. Jobe. Harwood is a very small place, and people all knew each other.'" That case recognizes the doctrine that acquaintanceship acquired by the agent in social intercourse is, if not forgotten, chargeable to the principal. Also in Western U. Tel. Co. v. Hendricks,[23] a telegraph operator at the place where delivery of a message was to be made knew that the sendees of the message were at the time of said operator's receipt of the telegram temporarily in another city; and this knowledge was charged to the company and was held to have imposed upon it the duty of retransmitting the message to the place where the sendees then were. Western U. Tel. Co. v. Wofford,[24] is a case very similar to the Hendricks case; but the court, though holding the company liable for the failure of the operator to act on information obtained outside of his employment, attempts to draw a distinction which does not seem very reasonable. The opinion expresses approval of the rule that no knowledge of an agent will be imputed to the principal except such as is acquired while acting for the principal, but declares that the rule in question has no application to this case because the relation between a telegraph company and its operator is not that of principal and agent but that of master and servant. Since the authorities are all agreed that a telegraph operator who receives messages from the senders for transmission is the agent of the company, so far as any question of imputed notice is concerned, it would necessarily result, therefore, from the application of the court's distinction that the same operator sustains to his company the relation of agent when he is receiving a message from the sender for transmission and the relation of servant when he is taking a message from the wire for delivery to the sendee. It is difficult to see any logical basis for such a distinction or to find any authority for it other than the opinion in this case. Moreover, since the word agent is of greater dignity than the word servant, it is rather a queer doctrine that holds the principal responsible for the failure of a mere servant to act on information obtained outside of the employment and holds him not responsible for the failure of his agent to act on information so acquired.

In conclusion, it may be safely asserted that the overwhelming weight of modern authority, as well as the better reason, supports

[21] 65 Tex. 118.
[22] 25 S. W. Rep. 1036.
[23] 63 S. W. Rep. 341.
[24] 74 S. W. Rep. 943.

the proposition that, when one person is acting as agent for another in a transaction within the scope of the agency and while so doing is in possession of and has in mind information material to the matter in hand and is not at the time subjected to any influences prompting him to conceal the information from his principal, such information will be imputed to the principal, no matter when or how it reached the agent's mind. Perhaps it would not be very rash to say that in recent years not a single well-considered decision has been rendered to the contrary.

ROBERT M. ROWLAND.

Fort Worth, Tex.

THE QUESTION OF NEGLIGENCE FROM LEAVING BUILDING MATERIALS IN THE STREET AND INJURY TO CHILD IN CONSEQUENCE.

FRIEDMAN v. SNARE & TRIEST CO.

Court of Errors and Appeals of New Jersey, June 19, 1905.

In the absence of anything to show the contrary, the title and legal possession of the owner or occupant of lands abutting upon a street presumably extend to the middle of the street.

Landowners have the right to deposit in the street building materials required for the improvement of the abutting property. The right is to be reasonably exercised in view of the rights of the public, and is subject to regulation in the public interest.

The fact that building materials lying in the street may be so arranged as to be attractive to children as a place for play, or as a resting place during or after play, does not impose upon the landowner or his agent a duty to so arrange and maintain the materials as to render them safe for such uses. In such cases attraction or temptation is not legally equivalent to invitation.

PITNEY, J.: The defendant in error, who was plaintiff below, recovered a verdict and judgment for the damages that accrued to him through personal injuries sustained by his daughter, Fannie Friedman, a child between four and five years of age, by reason, as alleged, of the negligence of the defendant. Reversal is prayed because of alleged trial errors, evidenced by bills of exception.

The declaration sets up that the firm of Colgate & Co. were proprietors and operators of a building and premises situate on the south side of York street, in Jersey City, used and operated as a manufactory for soaps and perfumes; that the defendant, Snare & Triest Company, was constructing an addition to the building, and was engaged in making certain repairs to the same, under contract with Colgate & Co.; that the defendant improperly placed and piled upon the sidewalk of the street, adjacent to the building, sundry iron girders, each 22 feet in length, 15 inches in height, and four inches in width, and each weighing about 1,000 pounds, in such manner that the girders were piled insecurely one above the other, and so that one of the girders rested in an insecure position, and was liable to fall suddenly and without warning and injure persons walking upon the street; that the defendant permitted the girders to remain in this insecure and dangerous position, without notice or warning to travelers; and that the insecure girder fell suddenly and without warning upon Fannie Friedman while she was traveling, walking, and passing upon the sidewalk adjacent to the building, and without negligence on her part, and thereby crushed her foot, etc. Upon the trial it was shown that the child was injured through the fall of one of twelve girders, of the character described in the declaration, that had been piled upon the sidewalk in front of Colgate & Co.'s premises, and had been permitted to remain there between two and four weeks, awaiting use in certain repair work that was in progress upon the factory. It was in controversy whether the jury could reasonably find from the evidence that the Snare & Triest Company was responsible for placing the girders there, or for their care while remaining in that position, or that there was any want of care about placing or maintaining them. For the sake of simplicity, we will assume that the legal questions thus raised were properly disposed of by the learned trial justice. It was indisputable, however, that the girders were required as building materias for the repair of the Colgate factory; that the defendant, if connected with the transaction at all, had delivered the girders under employment by Colgate & Co., and placed them longitudinally upon the sidewalk, piled one upon another, immediately adjacent to the front of the building, which abutted upon the side of the street. While numerous witnesses gave variant accounts of the way in which the Friedman child received her injury, it appears from all accounts that she was one of several small children who either were at the moment, or immediately before had been, playing upon the pile of girders. The evidence in no aspect sustained the averment of the declaration that at the time of her injury Fannie was walking and passing along the sidewalk as a traveler. She was either playing with the other children upon the girders, or was at the moment seated upon a girder, resting from her play. For this reason, at the close of the plaintiff's case an offer was made to amend the declaration to conform to the facts in this respect; and, while no amendment was actually made, the pleadings were treated for the purpose of the trial as if amended.

Under this state of the pleadings and proofs, therefore, we assume that the jury might reasonably find that if any legal duty was owing to the injured child or to the plaintiff, as her parent, with respect to the condition of the pile of girders, it was owing by this defendant, and that if

this duty included the exercise of care that the girders should be so placed and maintained as not to cause injury to children playing upon them, or resting upon them during the play, it might be found that the duty had been neglected. At the same time the question of defendant's responsibility must be viewed in the light of the uncontroverted fact that whatever it had done about placing and keeping the girders there had been done under employment of Colgate & Co., for the purpose of repairs upon their building, and done in their right as owners and occupants of the land.

Motions for nonsuit and for direction of a verdict in defendant's favor were overruled, and the case was submitted to the jury with instructions from the trial justice to the effect that the defendant company had the right to put the girders in the street, provided they were put there in a safe condition; that while they remained there the duty rested upon the defendant of seeing that they were kept in a safe condition; that the propensity of little children to play upon the street, and to rest from their play in the street, was to be taken into consideration; that if the girders were left in the street in such condition that they would tempt little children to make use of them either for play or for resting, and would be dangerous to the children thus using them, a case of actionable negligence was made out; and that the fact that Fannie Friedman was playing upon the girders, in view of her tender years, would not bar her right to recovery. Numerous exceptions challenged the propriety of these instructions, and of other rulings and instructions that were based upon the same theory.

There was nothing in the case to exclude the inference that the title and possession of Messrs. Colgate & Co. extended to the middle of the street. In our courts it has long been established that, in the absence of anything to show the contrary, the title and legal possession of the abutting owner or occupant do extend to the middle of the road or street; the freehold remaining in him, subject only to the easement or right of passage in the public. So it was laid down in our supreme court more than half a century ago in Winter v. Peterson, 24 N. J. Law, 524, 527, 61 Am. Dec. 678. The same rule was recognized 10 years later by Chancellor Green in Hinchman v. Paterson R. Co., 17 N. J. Eq. 75, 82, 86 Am. Dec. 252, where he said: "The presumption of law is that the owners of the land on each side of the street own to the middle of the street, and have the exclusive right to the soil, subject to the right of way. It is objected by the defendant's answer that the complainant's titles do not extend to the middle of the street, because the lands as described are bounded by the sides of the streets. But the established inference of law is that a conveyance of land bounded on the public highway carries with it the fee to the center of the road, as part and parcel of the land." This statement of the rule was referred to by Chief Justice Beasley in delivering the opinion of this court in Salter v. Jonas, 39 N. J. Law, 469, 472, 23 Am. Rep. 229; and the rule was made the basis of deciding that in a conveyance of lands, with abuttals coinciding with the side of a street or highway, nothing short of express words of exclusion will prevent the title from extending to the middle of the street, if the grantor at the date of such conveyance is the owner of the street to that extent. In Weller v. McCormick, 52 N. J. Law, 470, 473, 19 Atl. Rep. 1101, 8 L. R. A. 798, it was held by the supreme court that where one is in actual occupation, as owner, of the premises abutting upon the street, his title and possession presumably extend to the middle of the street, subject only to the public rights. The same doctrine is recognized in Hoboken Land & Imp. Co. v. Kerrigan, 31 N. J. Law, 13; State, Benson, Pros. v. Mayor, etc., of Hoboken, 33 N. J. Law, 280, 281; Green v. Trenton, 54 N. J. Law, 92, 102, 23 Atl. Rep. 281; Ocean Grove v. Berthall, 62 N. J. Law, 89, 40 Atl. Rep. 779; and Ocean City Assn. v. Shriver, 64 N. J. Law, 554, 46 Atl. Rep. 690, 51 L. R. A. 425. The substantial character of the rights of the abutting owner in the soil of the street is recognized in all our decisions that touch upon the subject. Besides the cases already noted, the following may be referred to: Wright v. Carter, 27 N. J. Law, 76. See State v. Laverack, 34 N. J. Law, 207; Burnet v. Crane, 56 N. J. Law, 288, 28 Atl. Rep. 591, 44 Am. St. Rep. 395; Wuesthoff v. Seymour, 22 N. J. Eq. 66, 70; Avis v. Vineland, 56 N. J. Law, 474, 477, 28 Atl. Rep. 1039, 23 L. R. A. 685; French v. Robb, 67 N. J. Law, 260, 51 Atl. Rep. 509, 57 L. R. A. 956, 91 Am. Dec. 433.

It is the undoubted right of landowners to deposit in the street building materials required in the improvement of their abutting property, although the public lawfully using the street may be, as in many cases they necessarily are, to some extent incommoded thereby. 29 Am. & Eng. Ency. Law (2nd Ed.), Tit., "Roads & Streets," p. 156. Of course, the right is to be reasonably exercised, in view of the rights of the public, and is subject to regulation in the public interest. Where the ownership of the soil of the street is not in the abutting owner, his right to use the street for this and other like purposes is vindicated on the ground of necessity as in Van O'Linda v. Lothrop, 21 Pick. 292, 297, 32 Am. Dec. 261. While not questioning that necessity would furnish a sufficient justification in the present case, yet since it appears that Messrs. Colgate presumably held the legal possession of the soil of the street, the right of the defendant, as their contractor, to store building materials there, may be simply and directly referred to the landowner's right to use the soil for all proper purposes, provided he avoided unreasonable interference with the public easement. It is manifest that every deposit of building materials of the character now in question necessarily amounts to a temporary exclusion of the

public from the space thus occupied. A reasonable interference with the public easement is rightful. If the public be unreasonably hindered or endangered, the party at fault may be indicted for maintaining a public nuisance, or may be required to remove the obstruction. And further, an individual member of the public, if specially damnified by the nuisance while in the exercise of his rights in the street, may maintain a private action. But this refers only to parties injured while using the street as a street, and not to those whose injuries arise from their attempted use of the obstructing materials for their own purposes, whether of pleasure, convenience, or profit. For the building materials themselves do not in any sense become public property by being allowed to remain in the street. * * * The case for the plaintiff rests upon the theory that since these girders were so arranged as to be attractive to children, and since the injured child, with her companions, was using them as a place for play, or as a resting place during or after play, the proprietors of the premises, or the defendants, upon whom, as independent contractors, the matter had been devolved, owed a duty to the children to so arrange the girders as to render them safe for their use. With this view we do not agree. * * * But in the present case the very question is whether any duty existed, and we are unable to see that the age of the child is pertinent upon this inquiry. That the party injured in this case was less than five years of age did not at all tend to give her any property interest or right of user in the defendant's girders. Whether she used them as licensee or as trespasser, in either case there was no duty upon the owner to exercise active care with respect to her safety.

The fact that a dangerous place or object is attractive to children of tender years is legitimately significant where the question of their own want of care is raised. But there are fundamental, and, as we think, insuperable, difficulties standing in the way of adopting the rule that the mere attractiveness of private property gives to the person attracted rights against the owner. One difficulty is that the rule *pro tanto* ignores the distinction between *meum* and *teum*. And on what principle is it to be limited to cases of trespass? Why does it not apply equally to the conversion of personal property, or even to larceny? If those who temporarily and for limited purposes convert the private property of their neighbors to their own use are to be not only excused, but justified, where by reason of their tender years they were tempted to the trespass, and at the same time are to have rights of action against the true owner for the failure to exercise care about rendering the property suitable for their use, why may not those who under similar temptation convert the property of others wholly to their own use be likewise justified, and, instead of a right of action, gain a complete title to the property by simply appropriating it?

Another and a very practical difficulty that confronts the attempt to lay down any legal rule that depends for its limitations upon the attractiveness of objects to children of tender years lies in the extreme improbability that any man, however prudent, will be able to foresee what may or may not be attractive to children. Certainly, if a pile of steel girders, each weighing 1,000 pounds, deposited in the street as the girders in the present case were deposited, must be foreseen by a prudent man to be attractive to children, we are unable to say what object may not be thus attractive.

These are the views which we entertain after a careful consideration of the question at issue in this case, after most learned and able arguments by counsel on both sides, and a review of numerous reported decisions touching more or less closely upon the point.

We deem it unnecessary to rehearse at length the decisions cited by counsel for the plaintiff from the courts of some of our sister states, affirming, as is claimed, the general principle upon which the present plaintiff's right of action is based. Many, if not most, of those decisions depend fundamentally upon the same notion that in many states and in the Supreme Court of the United States has been given effect in the so-called turntable cases, which will be found collated in 29 Am. & Eng. Encyc. Law (2d. Ed.), p. 32. That is, that a landowner who maintains upon his own premises for his own purposes that which is alluring or tempting to little children is held to a duty of exercising care with respect to their safety, in anticipation of the probability that they may be tempted to make use of his property for purposes of play. This doctrine has been repudiated in this state by the cases of Turess v. N. Y., Sus. & West. R. Co., 61 N. J. Law, 314, 40 Atl. Rep. 614, decided by the Supreme Court, and Del., Lack. & West. R. Co. v. Reich, 61 N. J. Law, 635, 40 Atl. Rep. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727, decided by this court. The rule laid down in these cases is, as we think, wholly inconsistent with the asserted liability of the present defendant. That rule draws a clear distinction between temptation and invitation, and is to the effect that those who enter upon private property for their own purposes without invitation, but as trespassers or licensees, do so at their own peril, so far as any right on their part to call for active care on the part of the property owner for their welfare is concerned, and that although the injured party be an infant of tender years, and for that reason less able to care for its own safety, and more susceptible to the attractions that private property affords for purposes of play, this circumstance does not create a duty where none otherwise would exist. It is true that in our turntable cases the attractive objects were not within the limits of the public highway; but it is likewise true that in the present case, as already pointed out, while the building materials were within

the street, they were deposited there as private property for lawful purposes by the defendant, in the exercise of the landowner's rights in that behalf. And although the representatives of the public might complain of the occupancy of a portion of the street by building material, if unreasonably prolonged, or if the materials were insecurely placed, and although any one lawfully using the street as such might have an action if specially injured by collision with the materials, or by their fall if they were negligently left in an insecure position, we cannot see that these circumstances confer rights upon one who is using the building materials as the injured child in the present case was doing.

We hold, therefore, that the rulings and instructions of the learned trial justice above referred to were erroneous. The judgment under review should be reversed, and a venire *de novo* awarded.

NOTE.—We think the dissenting opinion in the principal case much better grounded in the good sense which the circumstances afforded as a basis of judgment. While there is no question but that under a common law dedication the adjoining property owner's rights extended to the middle of the street, and that in such property he had every right of ownership except that particular use for which the property was dedicated, still he had no right to interfere with the use for which the property was dedicated. The question in the above case is, did the owner of the adjoining property have such a private right in it as to give such proprietor exactly the same right, as against persons using the street, as he would had the property been enclosed and the materials placed in the enclosure for building purposes, and the injured child had entered into the enclosure and been injured. The opinion proceeds upon the theory that there is no difference in the two situations. It seems to us that common sense would declare a great difference. It is common knowledge that children in the streets are constantly on the look out for some means of amusement, that they do not use the discretion with regard to property so placed, as stated in the principal case, and that the placing of the beams as above stated, on the street, would naturally attract children passing by. Here were a lot of iron girders twenty-two feet long, weighing 1,000 pounds each, carelessly piled, probably thrown off the wagon on which they were brought, without a thought of order or the possibility of any one being injured. Thus, we have three elements upon which to exercise a judgment: the first, the right of the public to use the street; second, the right of the adjacent owner to use the property in such a way as not to be inconsistent with the public use; third, the natural tendency of children to play about materials placed as these girders were. We are very strongly of the opinion that if the child, which was injured as above shown, had been that of one of the judges whose opinion was to the effect that there was no actionable wrong in placing 1,000-pound girders in such a way as to fall upon a child playing about them, he would have seen the matter in a different light. To have so placed those girders and allowed them to so remain for three weeks, was, to our mind, gross negligence. It showed that want of care for the possible consequences as to amount to a wilful neglect. A person whose child was injured by the falling of a 1,000-pound girder, so carelessly placed, would be very apt to consider the injury as the result of a total want of consideration. Is it not a fact that must appeal to the mind with great force, that the placing of such materials on the street, in the way they were in the principal case, did show a complete disregard of the fact that children might come along and play about them, and that they would be apt to fall if they did, and that children do lack discretion? The majority opinion says that there is no duty, under such circumstances, devolving on the party so placing 1,000-pound girders, if children should be attracted to play on them as they passed along the street, where they had a right to be, and where they would see the girders and be apt to play about them. We say the majority opinion in such a case places no duty on the part of the owners of the property to try to avoid such an injury, although the law is supposed to be a rule to command what is right and prohibit what is wrong.

It seems to us the rules laid down by the learned judge from whom the appeal was taken declare the common sense of the situation. They are as follows: "If a person places his goods upon the street in a proper condition, and exercises reasonable care to see that they are kept in that or some other proper condition, he is not blamable. But, if he has not exercised reasonable care, if he has not had some supervision over them, and they have gotten out of condition and been out of condition sufficiently long that he would have been apprised of their improper condition if he had exercised reasonable care, then he is blamable; so you see that it is not only a question of their condition at the moment of the accident, but of their condition some time previous."

Mr. Justice Fort, in his dissenting opinion, said most aptly: "Unless it can be said that a child of tender years has no right upon the public highway, for any other purpose than the mere passage and repassage thereon, and that such a child is a wrong-doer if he stop to rest on girders left upon the highway, as in the case before us, then I am unable to see why it was not a question for the jury whether the plaintiff was or was not entitled to recover." He further goes on to say that "the learned justice who wrote the opinion of the majority in this case says, 'It would seem that many, and perhaps the greater number of reported cases, tend to sustain the action.' I think the true rule in this class of case is this: The line of liability lies in the affirmative or negative answer to this question: 'Was the thing which did the injury, at the time it did it, rightfully or wrongfully upon the highway?' If rightfully, then, if there for a temporary purpose, no liability; but if there, stored for a time, and hence wrongfully there, then liability, if injury result from a negligent act of the owner, and in such case any act resulting in injury, which the owner should have reasonably anticipated would happen, and which has happened, may constitute negligence. McDonald v. Snelling, 14 Allen, 290, 295, 92 Am. Dec. 768; Dixon v. Bell, 14 M. & S. 198; Wright v. M. & M. R. R. Co., 4 Allen, 283. For cases in point, decided in other states, the following references are made: Knuz v. City of Troy, 104 N. Y. 344, 10 N. E. Rep. 442, 58 Am. Rep. 508; Donoho v. Vulcan Iron Works, 7 Mo. App. 147; Chicago v. Keefe, 114 Ill. 222, 2 N. E. Rep. 267, 55 Am. Rep. 860; McGarry v. Loomis, 63 N. Y. 108, 20 Am. Rep. 510; District of Columbia v. Boswell, 6 App. Cas. D. C. 420; Gibson v. Huntington, 38 W. Va. 177, 18 S. E. Rep. 447, 22 L. R. A. 561, 45 Am. St. Rep. 853; Straub v. City of St. Louis (Mo. Sup.), 75 S. W. Rep. 100.

If I were unwilling to enforce the rule which I have stated as between an adult and an abutting proprietor storing articles upon the sidewalk or street, I should still feel clear, in the case of a *non sui juris* child, that the rule stated by the trial justice in this case was applicable. Chief Justice Beasley in Danbeck v. New Jersey Traction Co., 57 N. J. Law, 463, 31 Atl. Rep. 1038, was correct when he stated: 'Very few of the rules that regulate the conduct of a man with his fellow can be applied with the least show of reason to his intercourse with children. It is the legal duty of every one dealing with a child to protect it against its own indiscretion.' And in this opinion the distinguished Chief Justice quotes Lynch v. Nurdin with approval. I think that an abutting owner, placing materials upon the public highway in front of his premises, is bound to anticipate the possible use which a child may make of them in its innocency, and in accordance with the instincts and impulses naturally incident to child life, and that a duty is cast upon such abutting owner to exercise reasonable care and caution with respect to the probable conduct of such a *non sui juris* person. Powers v. Harlow (Mich.), 19 N. W. Rep. 257, 51 Am. Rep. 154 (Cooley, C. J.); Rachmel v. Clark (Pa.), 54 Atl. Rep. 1027, 62 L. R. A. 959. This rule is not in conflict with the rule declared in the turntable cases. D. L. & W. R. R. Co. v. Reich, 61 N. J. Law, 635, 40 Atl. Rep. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727. The conclusion in those cases, as I understand them, is expressly upon the ground that the turntables were upon private property, and that the plaintiff was a trespasser when injured. I am unable to conceive how a child resting upon the public highway, as the plaintiff was in this case, or even if in play, can in any sense be deemed a trespasser. The child, I think, was where the defendant should have reasonably anticipated that she might come."

The turntable case referred to was that of Delawrre, Lackawana & Western Ry. Co. v. Reich, where the plaintiff, a young child, was injured while upon a turntable of the defendant, near to a public street, and was entirely unprotected and unguarded. Children of all ages frequently congregated upon defendant's premises to play upon the turntable. It was held that there was no liability on the part of the railroad company to answer for the plaintiff's injury. While we question the soundness of this judgment, in view of the fact that children of all ages congregated about the turntable, and it does not appear that they were warned of the danger, or any attempt made to prevent such congregation, it would seem upon principle that such holding was wrong; yet there is a great difference between the turntable on entirely private grounds and a street where children were bound to go, and had a right to go. When the distinction is made between cases like the one under discussion and a case where private property is invaded, there is shown a clear difference and reasonable ground for a distinction. Yet if children are allowed to congregate, even on private property, where there is danger of injury, and the owner knew of such congregation, and might reasonably be supposed to know of the danger, and made no effort to stop such congregation, we think that such a case should present a question of negligence for a jury. At any rate, the dissenting opinion of Mr. Justice Fort, concurred in by Mr. Justice Bogert, are based upon right considerations, while the majority opinion leaves out important ones as shown.

JETSAM AND FLOTSAM.

MORTALITY OF TRUSTS.

The following is taken from Mr. Wollmans' able article on the "Mortality of Trusts:"

Nearly everybody in New York who is successful comes from some other place. The man who was very conscientious while running a small bank in Iowa or Nebraska will be very conscientious in Wall street. The man who believed that the end justified the means while he was a clerk in a country store in Louisiana or in Minnesota will not scruple very much about the means that he employs in Wall street.

Just about the same opinions, good or bad, that you hear expressed about the very vigorous and the very successful people in a town of eight or ten thousand inhabitants you will hear expressed about the big men in Wall street. Just as those statements, good or bad, are true in one place, they are true in the other.

People point to many recent revelations of great corporate and financial crimes that are being exposed in New York, and say, "The country is going to destruction; our big men are all crooked." These exposures indicate that there is a much higher general standard of honesty, so that wrong looks blacker and more shocking; they indicate that men are braver and more fearless, and, therefore, do not hesitate to strip the mask off of the wrongdoer, though he be rich and powerful; they indicate that the limelight is stronger. There is to-day a higher standard of honesty and integrity in every branch of commercial and professional life, in every part of this country, including Wall street, than there ever was.

It is safe to say that whatever Wall streets' shortcomings may be, it has brains, and it knows the rules of business, and it knows that in order to succeed these rules must be observed, and it knows that the trusts which it directs, unless they are managed in a way to give the public as nearly as possible one hundred cents of value for every dollar of its money, will fail.

No one can foresee what changes may take place in the personnel of the management of a trust. You can take the best-managed company, with a record of, say, fifty years of unbroken success, and turn it over to three incompetent, overbearing, shortsighted or visionary men, and they will wreck it in five years. Let the management of any trust pass into the hands of arrogant weaklings, and its end will be near. Inexperienced or incapable men on the bridge will run the strongest ship onto the rocks and destroy it.

Why is it that great businesses are so seldom carried on by the sons of the founders? Because the father had the ability, and the son does not have it, and while the business may have been turned over to the son in perfect shape, in a short time it vanishes.

What can better illustrate the danger to trusts from change in management than the great dry goods business of A. T. Stewart? Stewart's business was the pride of the business world; there was nothing to compare with it in the eastern or western hemisphere. It was built up on correct principles; it stood for everything that was highest and best in business; it was the model which every merchant taught his son to follow. The founder died. The new management was brainless, and almost farcical, and in three or four years that magnificent business, with capital unlimited and opportunities unbounded, became "the pale memory of a thing that was."

If the managers of trusts wrap themselves in the mantle of their own conceit and shut their eyes in the

foolish belief that because, foresooth, they now own the world, they will always own it, their days are numbered. Eternal vigilance is the price of the prosperity of every business, whether its capital is fifty dollars or fifty billion.

The same reason that make the names on the signs on Broadway change every ten or fifteen years will probably determine what trusts shall live and what trusts shall die. The same things that make a man successful or unsuccessful in a country town will, on a larger scale, make the largest trust successful or unsuccessful.

Trusts will live, not because they have great capital, not because they have blotted out competition, but because they are conscientiously, economically and ably managed.

Those that do not pursue the correct principles of business will go down. Those that are fortunate enough to do so will last. Those trusts that serve the public the best will survive; the others will perish off the face of the earth.—*Henry Wollman, New York Bar.*

BOOK REVIEWS.

PAGE'S LAW OF CONTRACTS.

The Law of Contracts, by William Herbert Page, of the Columbus (Ohio) bar, and Professor of Law in the Ohio State University, is a new work by an author who has become known as an able writer, and one from whom much was reasonably expected, because of the excellency of his work, entitled Page on Wills. The Law of Contracts fulfills every expectation and the result is that the Law of Contracts is brought up to date in a most reliable form. The author says: "The general outline of the subject, inherent in its very nature, which was worked out in its most perfect and convincing form by Sir William Anson, has been followed in this work."

Every lawyer ought to know the reason for the law, but in this day of "getting cases on all fours" it is growing more and more apparent that the reasons for the law do not give the average lawyer a great deal of worry, and the same may be said of many of our judges as well. There is no excuse for any one not to know the reason of the law, who reads Mr. Page's work. Mr. Anson's work was most excellent in this respect, because of his classification as well as his clear statement of legal principles and we find the same clearness in this work, both of statement and classification. For instance, after giving a short history of the Law of Contrats, which makes up Part I, he makes the Formation of the Simple Contract the subject of Part II, excluding parties. The subject of Part III is "Offer and Acceptance." This he classifies as follows: "Agreement essential element of contract. Offer and Acceptanec. Nature of offer—must purport creation of legal liability; must show intention to assume liability; invitations to negotiate. Terms must be complete. Offer must be definite. Form of offer—express offer. Communication of offer. Necessity of communication of offer in railroad contracts. Necessity of communication of offer in awards." Such is the process. It will be seen at a glance that it is a great aid in the lawyer's hands when drawing contracts. The whole of Volume I is given to the formation of contracts, and this volume contains 848 pages, devoted entirely to this subject. Next he takes up the construction or contracts and handles it in the same lucid manner and devotes 1080 pages to this branch of the Law of Contracts, which makes up Vol. II, and concludes with Vol. III, which is devoted to the questions relating to the operation and discharge of contracts—all of which is done most conscientiously, with copious notes and pertinent observations. The whole work is contained in 3083 pages. It is without doubt the most valuable work on contracts at the present date. A lawyer can not afford to be without it.

It is published by The W. H. Anderson Co., Law Book Publishers, Cincinnati, O.

BOOKS RECEIVED.

Probate Reports Annotated: Containing Recent Cases of General Value Decided in the Court of the Several States on Points of Probate Law. With Notes and References. By Wm. Lawrence Clark, Author of Clark on Contracts, Clark and Marshall on Corporations, etc. Vol. IX. New York. Baker, Voorhis & Company, 1905. Sheep, pp. 800. Price, $5.50. Review will follow.

HUMOR OF THE LAW.

A QUEER PREDICAMENT.

Down in Howell county, Missouri, are two characters who have made their marks thereabouts, in such a way that time will have traveled over considerable space ere memory of them will have wasted away. Both are lawyers, one the son-in-law of the other. Col. Monks, the father-in-law, a man of magnificent stature, and native ability, which, had it had the opportunity, would have made him a marked man anywhere. Henry Green, the son-in-law, is one of the brightest advocates in all that section, and a great wit, though of dimunitive form. One day they were on the opposite sides of a case. In addressing the jury, Col. Monks made reference to his son-in-law in this way: "Henry Green! Henry Green! Why, I could swallow Henry Green!" Quick as a flash, Henry retorted: "You'd be in a fine predicament, colonel, for you'd have more brains in your stomach than in your head."

The late Mr. Hamilton Spencer, of the Bloomington, Ill., bar, related this incident to the writer. In the trial of a case in the U. S. Court at Chicago, Judge Drummond presiding, involving claims arising from the building of a dam across the Kankakee river at Willmington, Illinois, Emery Storrs was cross-examining Mr. R. P. Morgan, a civil engineer of wide reputation and well known among his friends as apt at repartee. Mr. Storrs was a great cross-examiner, and not often left himself open to an attack which he was not able to come clear of. One of the witnesses on Mr. Storr's side of the case had testified that he could wade across the river, just below the dam, without getting over his knees in water. Mr. Storrs said: "Mr. Morgan, Mr. Smith says he can wade across the river below the dam without getting over his knees in water. What have you to say to that?" Mr. Morgan repeated the question, saying: "I understand you, Mr. Storrs, to ask what I have to say to that?" "Yes," replied Mr. Storrs, "that's the

question." "Well" responded Mr. Morgan, "I have to say to that, that Mr. Smith must have remarkably long legs!" Judge Drummond completely forgot his judicial dignity and nearly tipped over backwards in his chair with laughter, which was heartily joined in by lawyers, jury and hangers-on in the court room. For once Mr. Storrs was completely floored.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. ABANDONMENT — Assertion that Another is the Owner.—Assertion that another is the owner of land held not abandonment of all claim to the land, so as to preclude the one making the assertion from relying on adverse possession by tenant.—Cobb v. Robertson, Tex., 86 S. W. Rep. 746.

2. ACCOUNT STATED—Correction.—Account stated cannot be corrected, except for fraud, accident, or omission.—Chapman v. Liverpool Salt & Coal Co., W. Va., 50 S. E. Rep. 601.

3. ACKNOWLEDGMENT—Attack.—A certificate of acknowledgment cannot be overthrown upon evidence of a doubtful character, nor upon a bare preponderance of evidence, but only on proof so clear and convincing as to amount to a moral certainty.—Bennett v. Edgar, 93 N. Y. Supp. 203.

4. ADVERSE POSSESSION—Compensation —Where a street railway company, which occupied a street so as to interfere with the abutting owners' easements, made compensation therefor to certain persons, it admitted that its use was not adverse as to others.—Hindley v. Manhattan Ry. Co., 93 N. Y. Supp. 53.

5. ADVERSE POSSESSION—Evidence.—Neither a decree for the sale of a bridge and its abutments under a mechanic's lien, nor a purchase thereunder, held evidence of adverse possession of the land on which the abutments rested.—Nicolai v. City of Baltimore, Md., 60 Atl. Rep. 627.

6. APPEAL AND ERROR—Abstract.—On behalf of the party responsible for the abstract on appeal, the appellate court's investigation is confined to matters found in the abstract, unless some cogent reason appears for departing from the rule.—Slaughter v. Strouse, Colo., 79 Pac. Rep. 972.

7. APPEAL AND ERROR—Cross-Appeal.—Plaintiff, on appeal by defendant, held not entitled to complain of the action of the trial court, in the absence of a cross-appeal.—Pullman Co. v. Kelly, Miss., 38 So. Rep. 817.

8. APPEAL AND ERROR—Form of Brief.—Where a paper filed by appellant, entitled "Argument of Appellant," failed to contain either points, propositions, or argument, as required by supreme court rules 54, 56, the judgment would be affirmed on motion.—McCormick Harvesting Mach. Co. v. McCormick, Iowa, 103 N. W. Rep. 204.

9. APPEAL AND ERROR—Permission to Amend.—Where defendant demurred generally to an amended petition, and the court heard the demurrer and ruled on it and rendered judgment in the case, a presumption arose that plaintiff had permission to amend.—Turner v. Hamilton, Wyo., 80 Pac. Rep. 664.

10. APPEAL AND ERROR—Points on Appeal.—Objection that allowing a counterclaim to be filed was error held not to be made for the first time on appeal.—Burt-Brabb Lumber Co. v. Crawford, Ky., 86 S. W. Rep. 702.

11. APPEAL AND ERROR - Presumption.—Where there is no statement of facts in the record, the court on appeal must presume that the facts alleged by appellees were proved so far as necessary to support the judgment —Ellis v. National Exch. Bank, Tex., 86 S. W. Rep. 776.

12. APPEAL AND ERROR—The Law of the Case.—On appeal in proceedings by a property owner to be relieved from an assessment, the decision as to the constitutionality of the proceedings held binding in subsequent stages of the cause.—Fair Haven & W. R. Co. v. City of New Haven, Conn., 60 Atl. Rep. 651.

13. ASSIGNMENT FOR BENEFIT OF CREDITORS—Effect of Filing Claim with Assignee.—That a creditor had filed his claim and received a dividend from his debtor's assignee for the benefit of creditors held not to preclude such creditor from afterwards enforcing his claim against the debtor.—Little v. Sturgis, Iowa, 103 N. W. Rep. 205.

14. BANKRUPTCY—Cancellation of Judgment.—Owner of land on which a judgment against a bankrupt is an apparent lien held entitled to cancellation of the judgment, under Code Civ. Proc., § 1268 —Graber v. Gault, 93 N. Y. Supp. 76.

15. BANKRUPTCY—Preferences.—Equitable action by trustee in bankruptcy to recover preferences held not within the jurisdiction of New York City Court, as defined by Code Civ. Proc., § 315.—Dyer v. Kratzenstein, 92 N. Y. Supp. 1012.

16. BANKRUPTCY—Reducing Assets.—Trustee in bankruptcy cannot complain of the action of creditors in instituting suits to reduce to control assets of the bankrupt.—Davis v. W. F. Vandiver & Co., Ala., 38 So. Rep. 850.

17. BANKRUPTCY—Trustee.—In an action by a trustee in bankruptcy to recover property of the bankrupt, the presumption is that the trustee had complied with all the requirements of the law and was qualified to act.—Breckons v. Snyder, Pa., 60 Atl. Rep. 575.

18. BENEFIT SOCIETIES—Assessments.—Largest lawful assessment that could be made under by-laws of labor association held one sufficient to pay $10 a week to each member out of employment.—Moeller v. Machine Printers' Beneficial Ass'n, R. I., 60 Atl. Rep. 591.

19. BENEFIT SOCIETIES—Assignment.—Rules of a mutual benefit society, prohibiting assignment of members' certificates, held unavailable as between a beneficiary and a third person paying assessments under an agreement for reimbursement.—Coleman v. Anderson, Tex., 86 S. W. Rep. 730.

20. BENEFIT SOCIETIES—Death While Under Suspension.—Under the laws of a beneficial association, a member by default in payment of assessments held to lose his membership, and, dying in default, though before expiration of the 30 days allowed for reinstatement, to lose all rights in the benefits.—Delaney v. Kelly, 92 N. Y. Supp. 1021.

21. BILLS AND NOTES—Intention in Assignment.—Assigning a note to a committee of which the maker is a member held not to discharge it, this not being intended. —Welch v. Kinney, Oreg., 80 Pac. Rep. 648.

22. BILLS AND NOTES—Set-Off.—The maker of a note payable to a bank and assigned by its assignee after maturity held entitled to set off his unpaid deposit account in the bank against the holder.—Little v. Sturgis, Iowa, 103 N. W. Rep. 205.

23. BRIDGES—Sale.—A trustee's deed, conveying "a bridge and masonry," executed on a sale under a judgment foreclosing a mechanics' lien thereon, held not to pass the land on which the abutments rested.—Nicolai v. City of Baltimore, Md., 60 Atl. Rep. 627.

24. CARRIERS—Delay in Transportation.—That a shipper may recover special damages for delay in transportation, he must show that the carrier was notified of the special circumstances.—Daube & Kapp v. Chicago, R. I. & T. Ry. Co., Tex., 86 S. W. Rep. 797.

25. CARRIERS—Elevators.—Act of proprietor of store in leaving elevator shaft unobstructed held negligence with respect to customers.—Morgan v. Saks, Ala., 38 So. Rep. 848.

26. CARRIERS—Getting Off Car while Moving.—Where a street car passenger stepped off a car while going at a high speed, with his face toward the rear of the car, he was guilty of contributory negligence.—Birmingham Ry., Light & Power Co. v. Glover, Ala., 38 So. Rep. 836.

27. CARRIERS—Overcharges.—Where a petition against a railroad for overcharges counted on a special agreement, no recovery could be based on the railroad's general tariff rate.—Greason v. St. Louis, I. M. & S. Ry. Co., Mo., 86 S. W. Rep. 722.

28. CARRIERS—Uncontrollable Events.—Common carriers held liable, under Rev. Civ. Code 1870, art. 2754, for fires destroying freight, unless they can prove that loss was occasioned by accidental or uncontrollable events. —Lehman, Stern & Co. v. Morgan's Louisiana & T. R. & S. S. Co., La., 38 So. Rep. 873.

29. CONSTITUTIONAL LAW—Equal Protection of Laws.—Statute passed in the exercise of police power satisfies constitutional requirement of equal protection of laws if it applies uniformly to all citizens similarly circumstanced.—Wright v. Hart, 98 N. Y. Supp. 60.

30. CONSTITUTIONAL LAW — Highway Supervisors.—Laws 1903, p. 225, ch. 119, § 12, authorizing appointment of road supervisors from among "qualified electors" in each district, held not in violation of Const. art. 1, § 12.—State v. Newland, Wash., 79 Pac. Rep. 983.

31. CONSTITUTIONAL LAW—Publication of White Man as a Negro.—Thirteenth, fourteenth and fifteenth amendments of the United States Constitution held not to have destroyed the law of the state making the publication of a white man as a negro anything but libel.—Flood v. News & Courier Co., S. Car., 50 S. E. Rep. 687.

32. CONSTITUTIONAL LAW—Regulation of Inflammable Materials — Though an ordinance prohibiting the storage of explosive oils within the corporate limits puts an end to a business, its enforcement held not a depriving of property without due process of law, where circumstances justified its adoption as a police regulation.—City of Crowley v. Ellsworth, La., 38 So. Rep. 199.

33. CONSTITUTIONAL LAW—Sale of Intoxicating Liquors in Private Room.—An ordinance prohibiting sale of intoxicating liquors in private rooms held not to contravene Const. art. 1, § 21, inhibiting laws granting exclusive privileges, by making an exception in favor of hotels.—Sandys v. Williams, Oreg., 80 Pac. Rep. 642.

34. CONSTITUTIONAL LAW—Statute Prohibiting Hogs from Running Around.—Acts 1903, p. 1342, ch. 499, prohibiting the running at large of hogs, etc., in certain counties, held not class legislation, within the prohibition of Const. art. 14, § 8.—Murphy v. State, Tenn., 86 S. W. Rep. 711.

35. CONTINUANCE—Absence of Parties.—The affidavit for a continuance because of the absence of a party to the cause should disclose the facts expected to be proven by such party and that such facts cannot be sufficiently proven by other witnesses. — Reynolds v. Smith, Fla., 38 So. Rep. 903.

36. CONTRACTS — Administrator. — An administrator held entitled to sue on an oral contract made between two creditors of the estate to recover the debts and expenses of the administration contracted to be paid by one of them.—Stewart v. Rogers, Kan., 80 Pac. Rep. 58.

37. CONTRACTS—By-Laws of Benefit Society.—A by-law of a beneficial association, prohibiting members from resorting to the courts for relief until all means provided by the order for redress had been exhausted, held not invalid.—McGuiness v. Court Elm City, No. 1, Foresters of America, Conn., 60 Atl. Rep. 1023.

38. CONTRACTS—Estoppel.—One who contracts with an alleged corporation is estopped to deny its corporate existence at the date of the contract.—Clark v. American Cannel Coal Co., Ind , 73 N. E. Rep. 727.

39. CONTRACTS — Materialmen. — A materialman, to whom the owner had agreed to pay the cost of materials sold to the contractor when he completed the work, held entitled to complete the contract, on the contractor's failure to perform.—Bates v. Birmingham Paint & Glass Co., Ala., 38 So. Rep. 845.

40. COPYRIGHTS—Laches.—Complainants in a suit for infringement of copyright held not barred from relief by laches.—Werner Co. v. Encyclopædia Britannica Co. U. S. C. C. of App., Third Circuit, 134 Fed. Rep. 831.

41. COPYRIGHT—Proof of Damages.—Proof of damages is not essential to entitle a complainant to an injunction restraining the infringement of a copyrighted publication.—Sampson & Murdock Co. v. Seaver-Radford Co., U. S. C. C., D. Mass., 134 Fed. Rep. 890.

42. COPYRIGHT—Use of Copyrighted Directory.—A compiler of a general directory has the right to use a prior copyrighted general directory, both to verify the results of his own work and to show him and direct him to the persons on whom it may be worth his while to call — Sampson & Murdock Co. v. Seaver Radford Co., U. S. C. C., D. Mass., 134 Fed. Rep. 890.

43. CORPORATIONS—Agency.— Agency for a corporation may be proved as for a natural person, and authority conferred by the corporation may be implied as in other cases.—Brown v. British American Mortg. Co., Miss , 38 So. Rep. 312.

44. CORPORATIONS—Fraudulent Transfer of Property.—A transfer by an insolvent corporation of all its assets to another corporation held fraudulent, under Ballinger's Ann. Code & St. § 4265, as against creditors of the selling corporation.—Tacoma Ledger Co. v. Western Home Bldg. Assn., Wash., 79 Pac. Rep. 992.

45. CORPORATIONS — Insolvency of Foreign Corporation.—The stockholders of a corporation are within the jurisdiction of the courts of the state in which the corporation is organized, so far as is necessary to determine their rights and liabilities on the insolvency of the corporation.—Abbott v. Goodall, Me., 60 Atl. Rep. 1030.

46. CORPORATIONS—Purchase of Goods by President at Inadequate Price.—President of a corporation held not liable to it for goods alleged to have been purchased by him from the corporation at an inadequate price.—Consolidated Fruit Jar Co. v. Wisner, 93 N. Y. Supp. 128.

47. CORPORATIONS—Sale of Franchise.— Stockholders of a corporation which sells its franchise cannot avail

themselves of the want of authority of the purchasing corporation to buy the same to defeat the sale.—Hinds County v. Natchez, L. & C. R. Co., Miss., 38 So. Rep. 189

48. CORPORATIONS — Unreasonable Salaries. — Where the directors of a corporation paid unreasonable salaries to themselves, a stockholder held entitled to sue in behalf of the corporation to enforce its rights in the premises.—Donald v. Manufacturers' Export Co., Ala., 38 So. Rep. 841.

49. COURTS Jurisdictional Amount.—Where a special exception is sustained to a portion of the amount demanded in a petition in the county court, and the amount remaining is less than $200, the court is thereby deprived of jurisdiction of the cause.—Texas & P. Ry. Co. v. Butler, Tex., 86 S. W. Rep. 800.

50. COURTS—Probate.—The trial of issues to a jury in a probate appeal is governed by the same rules as a suit in equity.—Crocker v. Crocker, Mass., 73 N. E. Rep. 1068.

51. CRIMINAL EVIDENCE — General Questions. — On criminal prosecution, overruling objection to question asking witness, "Go on and tell what happened," held not error.—State v. Castigno, Kan., 80 Pac. Rep. 630.

52. CRIMINAL EVIDENCE—Letters.— In a prosecution for rape, defendant held entitled to cross-examine prosecutrix as to the contents of a certain letter written by prosecutrix to defendant after the alleged rape.—State v. Hayes, N. Car., 50 S. E. Rep. 623.

53. CRIMINAL EVIDENCE—Res Gestæ.—Statements of deceased, four or five minutes after a fatal shooting, held not part of the *res gestæ*.—Vickery v. State, Fla., 38 So. Rep. 907.

54 CRIMINAL TRIAL—Dismissing Appeal.—Where the circuit court dismisses an appeal from the municipal court for want of jurisdiction, it is a refusal to exercise a jurisdiction conferred by law, warranting *mandamus*.—State v. Wills, Fla., 38 So. Rep. 289.

55. CRIMINAL TRIAL—False Answers of Juror.—Action of the trial court in a murder case in refusing a new trial, moved for on the ground that a juror had made false answers to questions put to him touching his competency, held not an abuse of discretion. — State v. Lauth, Oreg., 80 Pac. Rep. 660.

56. CRIMINAL TRIAL—Indictment.—That an indictment charged the receipt of silver, knowing it to have been stolen, while the proof showed receipt of pieces of silver partly manufactured into spoons, etc., held no ground for arrest of judgment.—State v. Nelson, R. I., 60 Atl. Rep. 589.

57. CRIMINAL TRIAL — Information and Complaint.—When the information has been filed, it will be presumed, on objection being made after verdict, that the complaint on which it was based was also filed.—Steinke v. State, Tex., 86 S. W. Rep 753.

58. CRIMINAL TRIAL—Instructions.—In a prosecution for homicide, it was error to refuse to charge that if, from the evidence, there was a probability of the innocence of defendants, they should be acquitted.—Bardin v. State, Ala., 38 So. Rep. 838.

59. CRIMINAL TRIAL—Instructions.—A charge to acquit, if the circumstances can be reconciled with the theory that another committed the crime, held properly refused, as ignoring the reasonableness of the theory.—Russell v. State, Ala., 38 So. Rep. 291.

60 CRIMINAL TRIAL—Instructions.—Where three persons are prosecuted under the same indictment, the jury should be instructed that one or two may be convicted or acquitted, without the conviction or acquittal of the other.—State v. Daniels, La., 38 So. Rep. 894.

61. CRIMINAL TRIAL—Instructions.— The correctness of a charge on a higher grade of offense than that of which defendant has been convicted is immaterial.—Vickery v. State, Fla., 38 So. Rep. 907.

62. CRIMINAL TRIAL—Jurisdiction — A plea by one P to a bill denied that the property concerning which relief was sought was located in New Jersey, though it was the capital stock of a New Jersey corporation. Held that, inasmuch as the situs of the stock was in New Jersey, New Jersey courts had jurisdiction to proceed against P, a nonresident, in respect to it.—Andrews v. Guayaquil & Q. Ry. Co., N. J., 60 Atl. Rep. 568.

63. CRIMINAL TRIAL—Questions to Jury on Voir Dire.—In criminal case, refusal to permit jurors to be asked on their *voir dire* examination questions as to what their leaning would be, if evidence was, in their mind, evenly balanced, held reversible error.—People v. Peck, Mich., 103 N. W. Rep. 178.

64. CRIMINAL TRIAL—Severance.—The state may defeat a motion for severance by showing an agreement between the state and the party against whom the severance is asked to turn state's evidence.—Oates v. State, Tex., 86 S. W. Rep. 769.

65. DAMAGES — Detaining Property. — In an action against a city for detaining plaintiff's hack, and permitting it to be injured by exposure to the weather while in use by defendant, findings held to justify judgment for nominal damages only.—Nichols v. City of New Britain, Conn., 60 Atl. Rep. 655.

66. DEEDS—Rule in Shelley's Case. — A deed to the grantee, "to have and to hold during her lifetime, and to the heirs of her body after her death," conveyed to the grantee a fee under the rule in Shelley's case.—Wilson v. Rusk, Iowa, 103 N. W. Rep. 204.

67. DIVORCE—Condonement.—In a suit for divorce on the ground of adultery, issues of consent of plaintiff, limitations, and condonement should be tried by the court, and should not be submitted to the jury with the issue of adultery.—Bush v. Bush, 93 N. Y. Supp. 159.

68. DOMICILE—Domicile of Wife.—The domicile of a husband is that of the wife only where the husband has a domicile where she can stay —Wilcox v. Nixon, La., 38 So. Rep. 890.

69. DOWER—Right of Heir's Widow.—Where an heir died while his mother was living and claiming dower, the heir's widow was entitled to dower only in the heir's share of two-thirds of the estate.—Johnson v. Johnson, 93 N. Y. Supp. 197.

70. EJECTMENT—Description in Deed.—Where plaintiff's deed to the land in controversy described it according to the unauthorized plat, plaintiff was bound to prove that such description was identical with the true description by metes and bounds as alleged in the complaint.—Pace v. Crandall, Ark., 86 S. W. Rep. 812.

71. EJECTMENT—Property Purchased at Execution Sale.—To authorize a recovery in ejectment on a sheriff's deed, there must be a valid judgment, execution, etc., and it must be shown that judgment defendant had an interest subject to levy in the lands.—Carter v. Smith, Ala., 38 So. Rep. 184.

72. ELECTION—Injunction.—A petition for an injunction to restrain the clerk of the county court from placing the name of a candidate on the official ballot held insufficient to justify the issuance of an injunction without notice.—Commonwealth v. Combs, Ky., 86 S. W. Rep. 697.

73. EMBEZZLEMENT—Appropriating State Funds.—A party appropriating funds may be guilty of embezzlement thereof, though there is an executory contract of partnership, in which the funds are to be used.—Ray v. State, Tex., 86 S. W. Rep. 761.

74. EMINENT DOMAIN—Mineral and Oil Lands.—If the ownership in oils underlying the surface is left to the owner of the fee after the surface has been condemned, damages should be assessed only for the value of the surface.—Southern Pac. R. Co. v. San Francisco Sav. Union, Cal., 79 Pac. Rep. 961.

75. EMINENT DOMAIN—Waiver —A landowner held to have waived his constitutional right, under St. 1892, pp. 111, 113, ch. 154, §§ 3, 6, to damages in money for the taking of land by city.—Hellen v. City of Medford, Mass., 73 N. E. Rep. 1070.

76. ESCHEAT—Will.—Property held to *escheat*, though deceased made a will that the property be disposed of as the law directs.—State v Goldberg's Unknown Heirs, Tenn , 86 S. W. Rep. 717.

77. ESTOPPEL—Depositor May Resist Collection of Note by Bank's Assignee.—Neither the assignee of a bank nor the holder of a depositor's note transferred by such assignee held entitled to claim that the maker could not resist payment to the extent of his unpaid deposits.—Little v. Sturges, Iowa, 103 N. W. Rep. 205.

78. ESTOPPEL—Silence.—When one party to a cause by his silence has induced conduct on the part of his adversary, he is estopped to take advantage of any act or omission so induced.—Fair Haven & W. R. Co. v. City of New Haven, Conn., 60 Atl. Rep. 651.

79. EVIDENCE — Declarations of Deceased. — If the declaration of a person since deceased contains statements both in his favor and against interest, if those in favor equal or preponderate over those against interest, the declaration is inadmissible.—Massee-Felton Lumber Co. v. Sirmans, Ga., 50 S. E. Rep. 92.

80. EVIDENCE—Dictated Letter.—Letter purporting to have been dictated by a party against whom it is offered as an admission is not admissible in evidence to prove agency, in the absence of proof that he was in fact the author of it.—Brooke v. Lowe, Ga., 50 S. E. Rep. 146.

81. EVIDENCE—Dying Declarations.—A declaration cannot be admitted as a dying declaration, unless it be shown that deceased was conscious of approaching death.—Lyles v. State, Tex., 86 S. W. Rep. 763.

82. EVIDENCE — Proof of Signature. — Signature to a power of attorney held not sufficiently proven to justify the admission of the instrument in evidence.—Schaffer v. Emmons, 92 N. Y. Supp. 993.

83. EVIDENCE—Relevancy of Testimony.—Where the question asked of a witness fails to show that its answer would be relevant, its rejection can be assigned as error only when the court has been informed as to the nature of the testimony sought.—Marshall v. Marshall, Kan., 80 Pac. Rep. 629.

84. EVIDENCE—Shopbook Entries.—Shopbook entries are admissible to prove items that do not relate to the business and are not properly the subject of book account.—Bouldin v. Atlantic Rice Mills Co., Tex., 86 S. W. Rep. 795.

85. EVIDENCE—Testimony of Clerk.—Testimony of a clerk whose duty it was to attend to the matter in question held admissible to the issue as to whether a certain letter was ever received by his employers.—Netherlands Fire Ins. Co. v. Barry, 93 N. Y. Supp. 164.

86. EXECUTORS AND ADMINISTRATORS—Descent.—The proceeds of an insurance policy payable to "my wife and the heirs of my body" goes to the widow and children as individuals, and not to the personal representative.—Bramlett v. Mathis, S. Car., 50 S. E. Rep. 644.

87. EXECUTORS AND ADMINISTRATORS—Homestead.—Where the land of a decedent constituted a homestead, the county court had no jurisdiction of proceedings to sell the same for the payment of debts of the estate.—Dignowity v. Baumblatt, Tex., 85 S. W. Rep. 834.

88. EXECUTORS AND ADMINISTRATORS—No Bar Against Claims After Presentment.—Where administrators have collected the assets and petitioned for the settlement of their accounts, claims presented to the administrators in due time and not disputed do not afterwards become barred by lapse of time.—*In re* Hannon's Estate, 93 N. Y. Supp. 207.

89. EXECUTORS AND ADMINISTRATORS—Sale of Decedent's Land.—Where the record of proceedings to sell a decedent's land shows that the application was not made by a party in interest, as required by Rev. St. 1899, § 150, the proceedings may be attacked collaterally.—Stark v. Kirchgraber, Mo., 85 S. W. Rep. 868.

90. FIRE INSURANCE—Arbitration.—Where arbitrators of a fire loss were incompetent and interested, insured was justified in breaking up the arbitration and suing on the policy.—Western Assur. Co. v. Hall Bros., Ala., 38 So. Rep. 852.

91. FIRE INSURANCE—Proofs of Loss.—The furnishing of proofs of loss as required by the policy is, unless waived by the insurer, a condition precedent to a suit on the policy.—Perry v. Caledonian Ins. Co., 93 N. Y. Supp. 50.

92. FALSE PRETENSES—Unlawful Purpose.—One held guilty of theft, under Pen. Code, art. 861, in obtaining money by false pretext, though the pretext was that it was to be used for an unlawful purpose.—Lovell v. State, Tex., 86 S. W. Rep. 758.

93. FALSE PRETENSES—Corporation Partnership.—In a prosecution for obtaining money by false pretenses by selling property incumbered by a mortgage on a representation that it is clear, the information need not show whether the mortgagee is a corporation or a partnership.—State v. Wilson, Kan., 80 Pac. Rep. 639.

94. FRAUD — Damages.—In an action for false and fraudulent representations, whereby plaintiff was induced to sell corporate stock to defendants, plaintiff could not recover for future contingent profits on the stock.—Boulden v. Stilwell, Md., 60 Atl. Rep. 609.

95. FRAUDS, STATUTE OF—Partnership Agreement.—A writing is not necessary to the validity and enforceability of a partnership agreement to engage in a real estate enterprise.—Larkin v. Martin, 93 N. Y. Supp. 198.

96. GAMING—Defendant Must be Interested.—An indictment for keeping a gaming table is fatally defective, if it fails to charge that defendant was in any manner interested in the loss or gain of the table, as required by the statute.—Brazele v. State, Miss., 38 So. Rep. 314.

97. GAMING—Parties Defendant.—Where plaintiff alleges that at poker games within certain dates he lost a specific sum to defendants, which they refused to return on demand, there is no defect of parties defendant.—Parsons v. Wilson, Minn., 103 N. W. Rep. 163.

98. GIFTS—Indorsement of Securities.—Indorsement by testatrix on back of paper containing list of securities sold by her husband held not to show gift of the securities to the husband.—Gittings v. Winter, Md., 60 Atl. Rep. 630.

99. GUARDIAN AND WARD—Increased Value of Ward's Property.—Right of guardian to compensation for increased value of the property under his charge determined.—Bramlett v. Mathis, S. Car., 50 S. E. Rep. 644.

100. HIGHWAYS—Prescription.—The burden is on the party asserting a right of way by prescription to show open and adverse use for the prescriptive period, and that the owners were free from legal disability.—Wright & Vaughn v. Fanning, Tex., 86 S. W. Rep. 786.

101. HOMICIDE—Evidence.—On a prosecution for murder, held competent for state to prove that during the difficulty in which the homicide was committed defendant shot at the witness.—Lysle v. State, Tex., 86 S. W. Rep. 763.

102. HOMICIDE—Insanity.—Accused, on a prosecution for murder, held not relieved from criminal responsibility on the ground of insanity.—State v. Lauth, Oreg., 80 Pac. Rep. 660.

103. INJUNCTION—To Prevent Disclosures.—An injunction to restrain defendants from making certain disclosures will not be granted, in the absence of a showing that they threatened to, or probably will, make the same.—Griffith v. Dodgson, 93 N. Y. Supp. 155.

104. INTOXICATING LIQUORS—Local Option Law.—Local option law held not to supersede Portland city charter § 73, subds. 21, 48, so as to prevent regulation of the liquor business by the council; prohibition not having been put in force.—Sandys v. Williams, Oreg., 80 Pac. Rep. 642.

105. JUDGMENT—Injunction Against Enforcement.—To entitle a party to have a judgment against him enjoined it must clearly appear that it would be contrary to good conscience to allow it to be enforced.—Opie v. Clancy, R. I., 60 Atl. Rep. 635.

106. JUDGMENT—Prior Liens.—A judgment held subordinate to the superior equity of a prior specific lien, though the latter is created by a defective mortgage or conveyance.—Glen Morris Glyndon Supply Co. v. McColgan, Md., 60 Atl. Rep. 608.

107. JUSTICES OF THE PEACE—Failure of Plaintiff to Appear.—Where a case has been dismissed by a justice for failure of plaintiff to appear and is appealed, the only questions are the regularity of the proceedings for appeal and whether plaintiff defaulted.—Clement v. Breaux, La., 38 So. Rep. 900.

108. LANDLORD AND TENANT—Liability of Landlord to Tenant.—A landlord of a flat building held not liable for loss of the goods of a tenant of an apartment therein by fire caused by a defective flue —Cooper v. Lawson, Mich., 103 N. W. Rep. 168.

109. LANDLORD AND TENANT—Possession of Tenants.—A judgment rendered against the tenants of another in trespass to try title does not of itself make the possession of the tenants that of the judgment plaintiffs.—Cobb v. Robertson, Tex., 86 S. W. Rep. 746.

110. LIFE ESTATES—Adverse Possession.—Where land was devised to two for life, with remainder to the heirs of one, the possession of a grantee of all but one of such remaindermen held not adverse as to him until the death of both life tenants.—Bullin v. Hancock, N. Car., 50 S. E. Rep. 621.

111. LIFE INSURANCE—Consideration for Services.—In an action on a policy, evidence that insured received no consideration for occasional services rendered to a saloon keeper held admissible.—Collins v. Metropolitan Life Ins. Co., Mont., 80 Pac. Rep. 609.

112. LIFE INSURANCE—Contract.—Where a note was given for the first premium on an insurance policy, the application, note, and policy, forming one transaction, should be read together as an entire contract.—Fidelity Mut. Life Ins. Co. v. Bussell, Ark., 86 S. W. Rep. 814.

113. MANDAMUS—Decrees of Railroad Commission.—*Mandamus* is the remedy provided by Civ. Code 1902, § 2119, to enforce a decree of the railroad commission.—Railroad Com'rs v. Atlantic Coast Line R. Co., S. Car., 50 S. E. Rep. 641.

114. MANDAMUS—Refusal of Magistrate to Punish for Contempt.—The circuit court cannot review by *mandamus* the action of a committing magistrate in refusing to punish a witness for contempt.—Farnham v. Colman, S. Dak., 103 N. W. Rep. 161.

115. MASTER AND SERVANT—Negligence of Chauffeur. Owner of automobile held not respons ble to strangers for negligence of his chauffeur, operating the automobile for his own pleasure, in violation of his employer's orders.—Stewart v. Baruch, 93 N. Y. Supp. 161.

116. MASTER AND SERVANT — Proper Appliances. — While the master is bound to use due care and diligence in providing safe and sound machinery, he is not bound to provide every new appliance or supposed improvement.—Buttner v. South Baltimore Steel Car & Foundry Co , Md., 60 Atl. Rep. 597.

117. MECHANICS' LIEN—Waiver of Lien.—Acceptance of note from owner by materialman held not to constitute a waiver of right to a lien, where the note becomes due before the expiration of the period within which the lien may be filed.—Woolf v. Schaefer, 93 N. Y. Supp. 184.

118. MECHANICS' LIENS—Notice as to Responsibility of Owner.—Posting of notice by owner of building to effect that he would not be responsible for repairs thereof held to have been in conspicuous place, within B. & C. Comp. § 5643, concerning mechanics' liens.—Marshall v. Cardinell, Oreg., 80 Pac. Rep. 652

119. MINES AND MINERALS—Estate in Minerals.—There may be separate distinct estates in different persons in the surface of land and oil and other minerals in it.—Peterson v Hall, W. Va , 50 S E. Rep. 603.

120. MONOPOLIES—Charges for Purchasing Live Stock.—Laws 1891, p. 294, ch. 158 (Gen. St. 1901, §§ 2439-2441), prohibiting agreements to maintain rates for services in the sale of live stock for others, does not extend to agreements concerning charges for purchasing live stock.—State v. Wilson, Kan., 80 Pac. Rep. 639.

121. MORTGAGES—Priority.—Where mortgages on exempt property were executed by the husband alone, and plaintiff's assignors first received a valid mortgage he was entitled to priority.—Nicholson v. Avey, Iowa, 103 N. W. Rep. 201.

122. MORTGAGES — Substituting Trustee.—An instrument substituting a trustee in a deed of trust is of record from the time it is delivered to the clerk for record.—Brown v. British American Mortgage Co., Miss., 38 So Rep. 812.

123. MUNICIPAL CORPORATIONS—Bids.—Fact that better bid was made for bonds after acceptance of contract for sale thereof held not to authorize town to ignore its previous acceptance of buyer's proposal.—Diefenderfer v. State, Wyo., 80 Pac. Rep. 667.

124. MUNICIPAL CORPORATIONS—Care of Pedestrian — In an action for injuries sustained through falling into an opening in the sidewalk, an instruction that a higher degree of care is required of one using the sidewalk for business purposes than of an ordinary pedestrain held error.—Schindler v. Schroth, Cal., 80 Pac. Rep. 624

125. MUNICIPAL CORPORATIONS — Raising Sidewalk Above Grade.—Abutting owner, raising sidewalk to paper grade, thereby creating public nuisance, will be enjoined on bill filed by the borough.—Kittanning Borough v. Thompson, Pa., 60 Atl. Rep. 584.

126. MUNICIPAL CORPORATIONS—Registration of Automobiles.—A city ordinance, requiring registration and numbering of automobiles at a cost to the owner of one dollar, held not objectionable as a license.—People v. Schneider, Mich., 103 N. W. Rep. 172.

127. MUNICIPAL CORPORATIONS—Regulations Pertaining to Storage of Inflammable Materials.—A special ordinance granting permission to store refined oils within the city limits is repealed by a subsequent general ordinance making such storage a criminal offense.—City of Crowley v. Ellsworth, La., 38 So. Rep. 199.

128. MUNICIPAL CORPORATIONS—Requiring Billboards to be Made of Incombustible Material.—A city ordinance requiring billboards to be constructed of noncombustible material, and regulating the dimensions and construction thereof, applicable alike to all portions of the city, held void for unreasonableness.—City of Chicago v. Gunning System, Ill., 73 N. E. Rep. 1035.

129. MUNICIPAL CORPORATIONS—Taxation for Sinking Fund.—A city cannot recover from a taxpayer taxes levied to create a sinking fund for, and to pay interest on, void bonds.—City of Tyler v. Tyler Building & Loan Assn., Tex., 86 S. W. Rep. 750.

130. MUNICIPAL CORPORATIONS—Use of Streets.—One who purchases plotted land bound by a dedicated street obtains the right to the use of such streets as are reasonably necessary for the enjoyment of the land —Highbarger v. Milford, Kan., 80 Pac. Rep. 633.

131. NEGLIGENCE—Consciousness of Conduct —In order that one may be held guilty of willful or wanton conduct, it must be shown that he was conscious of his conduct and that injury would probably result therefrom.—Montgomery St. Ry. v. Rice, Ala., 38 So. Rep. 857.

132. NEGLIGENCE—Look and Listen — Failure of a person approaching a railroad crossing to look and listen held not necessarily negligence. — Wilson's Admrs. v. Chesapeake & O. Ry. Co., Ky., 86 S. W. Rep. 690.

133. NUISANCE—Private Parks or Gardens.—Private park in residence district, permitted to be used as a rendezvous for dissolute and drunken crowds, held a nuisance.—Palestine Bldg. Assn. v. Minor, Ky., 86 S. W. Rep. 695.

134. PARENT AND CHILD—Custody of Child.—Reciprocal affection existing between a child and its foster parents held to have little weight in determining the rights of the natural parents to the child's custody.—Parker v. Wiggins, Tex., 86 S. W. Rep. 788.

135. PARTNERSHIP—Part Performance.—On part performance of oral contract to engage in partnership real estate enterprise, equity held to have jurisdiction to compel accounting to ascertain share of profits to which partner part performance was entitled.—Larkin v. Martin, 93 N. Y. Supp. 198.

136. PARTNERSHIP — What Constitutes.—Transaction between mining corporation, its lessee, and a corporation selling goods to miners held not a partnership business between corporations or other officers and the lessee.—Paris Mercantile Co. v. Hunter, Ark., 86 S. W. Rep. 808.

137. PAYMENT — Rebates. —President of corporation, buying goods of the corporation and settling with them after dispute as to the price, held not entitled to recover rebates made on the price of such goods during the time of the transactions to other customers.—Consolidated Fruit Jar Co. v. Wisner, 93 N. Y. Supp. 128.

138. PERPETUITIES—Annuities.—At common law annuities are a charge simply on the estate or rents and profits, and are alienable, and hence do not violate laws against perpetuities.—Robb v. Washington and Jefferson College, 93 N. Y. Supp. 92.

139. PHYSICIANS AND SURGEONS—Qualifications.—Legislation prohibiting any one from treating a disease for a fee, except such persons as have prescribed qualifications, is a valid exercise of the police power.—State v. Marble, Ohio, 73 N. E. Rep. 1063.

140. PRINCIPAL AND AGENT—Knowledge of Agents.—Knowledge of agents and employees of purchaser of goods of the terms of the purchase, and their acts in relation thereto, they having conduct of his business, held binding on him —Consolidated Fruit Jar Co. v. Wisner, 93 N. Y. Supp. 128.

141. PRINCIPAL AND AGENT — Stockbrokers. — Certain stockbroker held not the agent of defendant, another stockbroker; and the latter could not be held liable for representations by the former to his customers.—Holman v. Goslin, 93 N. Y. Supp. 126.

142. RAILROADS—Backing Engine.—A railroad company is liable for backing an engine and tender without a lookout.—Willis v. Vicksburg S. & P. Ry., La , 38 So. Rep. 892.

143. RAILROADS—Deed from Abutting Owner.—A deed from abutting owner held not to have given a railroad the right to fill in the street above the established grade, so as to interfere with ingress and egress to the grantor's lots.—Conners v. Yazoo & M. V. R. Co., Miss., 38 So. Rep. 320.

144. RAILROADS—Passing Through a Town.—A railroad, whose line occupies a public street, is liable for its failure to employ reasonable means and exercise reasonable care to avoid injuring a person passing along the street.—St. Louis Southwestern Ry. Co. v. Underwood, Ark., 86 S. W. Rep. 804.

145. RAILROADS—Right of Way.—Grant of right of way for a term of 25 years held to entitle the grantee to a permanent injunction against a third party purchasing a right of way of grantor with notice of such first grant. —D. W. Alderman & Sons' Co. v. Wilson, S Car., 50 S. E. Rep. 643.

146. SALES—Purchase of Stocks on Margin.—Money invested in stocks on margin cannot be recovered from the broker, but the investor can only demand that the transactions be settled or tender the balance due on the purchase price and take the stock.—Holman v. Goslin, 93 N. Y. Supp. 126.

147. SALES—Warranty.—Whether a warranty made at the time of negotiations for sale of machine entered into the contract of sale as finally made held a question for the jury.—Powers v. Briggs, Mich., 103 N. W. Rep. 194.

148. SEQUESTRATION — Amendment of Bond. — The chancellor may permit a sequestration bond having only one surety to be amended, so as to fulfill the requirements of law.—Dean v. Boyd, Miss., 38 So. Rep. 297.

149. SPECIFIC PERFORMANCE—Referee.—Consent by defendant that a suit for specific performance be tried by a referee held not a waiver of defendant's objection that plaintiff had an adequate remedy at law.—Butler v. Wright, 93 N. Y. Supp. 113.

150. STREET RAILROADS—Contributory Negligence.—In an action for injuries to a bicyclist in a collision with a street car, facts held to establish her contributory negligence as a matter of law.—Furlong v. Metropolitan St. Ry. Co., 92 N. Y. Supp. 1008.

151. TAXATION—Lessee of Oil Lease.—A lessee under an oil lease for years has no vested taxable estate in the oil in the ground, either before or after he has found paying wells, but it is taxable to the surface owner.—Peterson v. Hall, W. Va., 50 S. E. Rep. 603.

152. TAXATION—Service of Tax Suit.—Where the owner of land is in occupation thereof, the state cannot deprive him of title by tax foreclosure suit against unknown owners, under Sayles' Ann. Civ. St. 1897, art. 5232o.—Bingham v. Matthews, Tex., 86 S. W. Rep. 781.

153. TENANCY IN COMMON—Adverse Possession.—In the absence of actual ouster, exclusive possession by a cotenant for less than 20 years is insufficient to bar his cotenant by adverse possession.—Bullin v. Hancock, N. Car., 50 S. E. Rep. 621.

154. TRESPASS—Unlawful Entry.—An action for trespass to land held to lie either to recover damages for the unlawful entry, or for the value of trees removed by defendant, or for damages to the land resulting.—Eldridge v. Gorman, Conn., 60 Atl. Rep. 643.

155. TRIAL—Instructions.—A charge calling on the trial court to declare that there is no evidence of a particular fact is properly refused.—Montgomery St. Ry. v. Rice, Ala., 38 So. Rep. 857.

156. TRUSTS—Implied Trust. — Property purchased in name of husband with proceeds of sale of wife's securities held impressed with trust in favor of wife, enforceable by her executor.—Gittings v. Winter, Md., 60 Atl. Rep. 630.

157. TRUSTS—Income.—The *cestui que* trust, entitled to the income from a trust fund, held not entitled to recover from the trustee an amount expended from the income for repairs on a building in which the trust fund was invested.—Whittingham v. Fidelity Trust Co., Ky., 86 S. W. Rep. 689.

158. TRUSTS—Termination.—A legal trust created by will held not terminated until the objects of the trust have been fully accomplished or their accomplishment has been made impossible.—Robbins v. Smith, Ohio, 73 N. E. Rep. 1051.

159. VENDOR AND VENDEE—Undue Influence. — Purchaser or mortgagee acquires a good title, notwithstanding undue influence practiced by his grantor or mortgagor, of which he has no notice.—Swanstrom v. Day, 93 N. Y. Supp. 192.

160. WATERS AND WATER COURSES — Irrigation. — A decree enjoining defendants from using the water of a creek and spring to irrigate undefined parts of a number of surveys was void for indefiniteness.—Watkins Land Co. v. Clements, Tex., 86 S. W. Rep. 733.

161. WATERS AND WATER COURSES—Overflow.—In an action against a railroad company for an overflow from construction of a trestle, held error to admit evidence as to the value of the land before the construction of the trestle.—San Antonio & A. P. Ry. Co. v. Kiersey, Tex., 86 S. W. Rep. 744.

162. WATERS AND WATER COURSES—Variance.—A variance between a count in the complaint in an action against a dam owner to recover damages for overflowing plaintiff's land, and the proof held immaterial.—Osborne v. City of Norwalk, Conn., 60 Atl. Rep. 645.

163. WITNESSES—Impeachment.—A witness cannot be impeached by showing that he had had difficulties and had made assaults.—Gray v. State, Tex., 86 S. W. Rep. 764.

164. WITNESSES—Proper Questions.—Where a question is not improper and does not necessarily call for improper evidence, an objection to it should be overruled. —Dickens v. State, Fla., 38 So. Rep. 909.

165. WORK AND LABOR—Clothing Furnished.—In an action for the value of plaintiff's domestic services, held, that clothing furnished her by defendant should be deducted in assessing her damages. — Fitzpatrick v. Dooley, Mo., 86 S. W. Rep. 719.